LIBRARY
SUPREME COURT, U. S.

FILED
SEP 12 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 513.

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Petitioners,

v.

FIRST NATIONAL BANK IN DALLAS in its private capacity and as trustee of the O'Connor and Morgan trusts and the Attorney General of Texas,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GERALD MEYER
Attorney for Petitioners
477 Madison Avenue
New York, N.Y. 10022

LEON ALEXANDROFF
NEIL A. POLLIO
of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Federal Rules Involved	5
1. 14th Amendment	5
2. Federal Rules of Civil Procedure	5
Rule 7(a)	5
Rule 8(d)	5
Rule 15(b)	5
Rule 49(a)	5
Statement	6
Reasons for Granting the Writ	19
I—Whether the charge to the jury that "Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them" was tantamount to instructing a verdict for the trustee on every issue determined by the state court judgment other than Kelton's representation of James and Michael, is a federal question which the court below decided in a way in conflict with this Court's decision in *Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625	19

PAGE

II—The refusal of the trial judge to submit to the jury under Rule 49(a) Fed. Rules Civ. Proc. a special issue as to the trustee's failure to disclose to the beneficiaries and to the state court material facts relating to the sale by the trustee to itself of trust property approved by the state court, separately from special issues as to the trustee's misrepresentations and concealment, where the issue of failure to disclose was raised by the trustee's pleadings and supported by substantial evidence received without objection is an important federal question which had not been, but should be settled by this Court and which the Court below decided in a way in conflict with decisions of other courts of appeals ... 24

III—Whether, where a jury's inquiry to the trial judge relates to the existence *vel non* of testimony in regard to a fact which is the subject of a judicial admission, the trial judge is required to so advise the jury, is an important question of federal procedure which has not been, but should be settled by this Court and which the Court below decided in a way in conflict with decisions of other courts of appeals 26

IV—In affirming the judgment of the District Court below, notwithstanding the trial judge's petulant expression of her bias and prejudice against Mrs. Grey, as well as the trial judge's predetermination of crucial issues in the case without any knowledge of the evidence, the Court below has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision 28

PAGE

V—Whether the due process requirements of the 14th Amendment are met and a state court acquires jurisdiction over beneficiaries of a trust in an action to approve the sale by trustee to itself of trust property when there is no service of process, and an attorney appearing on behalf of the trustee purports also to appear on behalf of such beneciaries is a federal question which has not been, but should be settled by this Court 28

CONCLUSION 33

Appendix A—Opinion, Judgment and Order Denying Motion for Rehearing of the United States Court of Appeals for the Fifth Circuit 1a

Appendix B—Texas Revised Civil Statutes, Art. 7425b, Sections 12, 23 and 24 ..... 1b

Table of Authorities

CASES:

Angeline Casualty Co. v. Bluitt, 235 F. 2d 764 (5 Cir. 1956) .....25 fn. 11

Armstrong v. Manzo, 380 U.S. 545 ..... 4, 30

Bates v. Preble, 151 U.S. 149 .....14 fn. 7

Brammer & Wilder v. Limestone County, 24 S.W. 2d 99 (Tex. Civ. App. 1929) .....21 fn. 9

Bryant v. Lewis, 27 S.W. 2d 604 (Tex. Civ. App. 1930) .....32 fn. 19

Callen v. Pennsylvania R.Co., 332 U.S. 625 3, 19, 20, 21, 22, 23

CASES (Cont'd):

PAGE

Callen v. Pennsylvania R.Co., 162 F. 2d 832 (3 Cir. 1947) 21, 22

Cooper v. Newell, 173 U.S. 555 ..... 4, 32

Covey v. Knight, 215 S.W. 2d 684 (Tex. Civ. App. 1948) ..... 32 fn. 19

Dana v. Morgan, 232 Fed. 85 (2 Cir. 1916) ..... 21 fn. 9

Earll v. Picken, 113 F. 2d 150 (C.A.D.C. 1940) ... 21 fn. 9

Re Garcia v. San Antonio & A.P.Ry. Co., 77 S.W. 275 (Tex. Civ. App. 1903) ..... 21 fn. 9

Greenlaw v. Pettit, 87 Tenn. 467 (1889) ..... 31 fn. 16

Gregory v. U.S., 365 F. 2d 203 (8 Cir. 1966) 27

Griffin v. Griffin, 327 U.S. 220 ..... 4, 30, 33

Grummons v. Zollinger, 240 F. Supp. 63, aff'd 341 F. 2d 464 (7 Cir. 1968) ..... 21 fn. 9

Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 ..... 19 fn. 8

J.W. Hill & Son, Inc. v. Wilson, 339 S.W. 2d 152 (Tex. Civ. App. 1966) ..... 32 fn. 19

Hotel Longview v. Pittman, 376 S.W. 2d 915 (Tex. Civ. App. 1955) ..... 31 fn. 16

Kerner v. Surface Transp. Corp., 266 App. Div. 356 aff'd 293 N.Y. 881 (N.Y. 1944) 28

Knipfer v. Shaw, 210 Wis. 617 (1933) 27

Langford v. Schamburger, 417 S.W. 2d 438 (Tex. Civ. App. 1967) ..... 14 fn. 6

Liken v. Shaffer, 64 F. Supp. 432 (D.C. Iowa 1946) ..... 21 fn. 9

CASES (Cont'd):

PAGE

Mickey v. Tremco Mfg. Co., 226 F. 2d 956 (7 Cir. 1955) 25

Milward Co. v. Luigart, 41 S.W. 568 (Ky. 1897) ... 28

Murphy v. Cartwright, 202 F. 2d 71 (5 Cir. 1953) ..14 fn. 6

Nixon v. Shaver, 115 W. Va. 469 (W. Va. 1934) ... 28

Palmiero v. Spade Distributing Co., 217 F. 2d 561 (9 Cir. 1954) 3, 25

Payne v. Livingston, 283 S.W. 701 (Tex. Civ. App. 1923) .....32 fn. 19

Schroeder v. City of New York, 371 U.S. 208 .... 4, 33

Service Life Ins. Co. v. Weinberg, 81 F. 2d 359 (7 Cir. 1936) .....14 fn. 7

Sullivan v. Dunne, 198 Cal. 183 (1926) .....31 fn. 16

Tilman v. Great American Indemnity Co., 207 F. 2d 588 (7 Cir. 1953) 3, 25

U. S. v. Fiorito, 300 F. 2d 424 (7 Cir. 1962) 27

U. S. v. Jackson, 257 F. 2d 41 (3 Cir. 1959) 4, 27

United States v. Jerome, 115 F. 2d 821 (D.C. S.D.N.Y. 1953) .....21 fn. 9

U. S. v. Throckmorton, 98 U.S. 61 .....19 fn. 8

Wittmeier v. Post, 105 N.W. 21, 65 (S.D. 1960) 27

Wood v. Carpenter, 101 U.S. 135 .....14 fn. 7

STATUTES AND RULES:

	PAGE
Rule 7(a) F.R.C.P.	5, 25
Rule 8(d) F.R.C.P.	5, 25, 26
Rule 15(b) F.R.C.P.	5, 26
Rule 49(a) F.R.C.P.	2, 3, 5, 13, 20, 23, 24, 25, 26
Art. 2224 Tex. Rev. Civ. Stat.	29
Art. 7425b, § 24D, Tex. Rev. Civ. Stat.	29
Art. 7425b, §§ 12 and 24E, Tex. Rev. Civ. Stat.	7, 29

TEXTS:

7 Corp. Jur. Sec. p. 897	31 fn. 16
3 Pomeroy's Equity Jurisprudence Sec. 900	14 fn. 7

IN THE

Supreme Court of the United States

October Term, 1968

No.

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Petitioners,

v.

FIRST NATIONAL BANK IN DALLAS in its private capacity and as trustee of the O'Connor and Morgan trusts and the Attorney General of Texas,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Cornelia O'Connor Grey, James C. Grey and Michael C. Grey, appellants in the proceeding below, pray that a writ of certiorari issue to review the judgment therein of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the Court of Appeals is reported at 393 F. 2d 371, and is set out in Appendix A hereto, pp. 1a to 28a, *infra*. A petition for rehearing was denied without opinion. The trial was by jury under Rule 49(a), Fed. Rules Civ. Proc., before the United States District Court for the Southern District of Texas, Dallas Division, (Hon. Sarah T. Hughes) and that Court filed no opinion.

Jurisdiction

The judgment of the Court of Appeals, affirming the judgment of the District Court is dated March 21, 1968. Petitioners' timely petition for a rehearing filed April 11, 1968, was denied by order dated June 14, 1968, and pursuant to Rule 32 of the Rules of the Court below, its judgment issued as and for its mandate on June 25, 1968. The jurisdiction of this Court is invoked under Tit. 28 U.S.C. § 1254(1).[1] The jurisdiction of the District Court was based on diversity of citizenship.

Questions Presented

1—Whether in submitting special issues to a jury under Rule 49(a) of the Federal Rules of Civil Procedure, in an action by the three beneficiaries of a trust against their trustee for damages for the sale by the trustee to itself of a trust asset, on the ground that such beneficiaries' consent to such sale, and the subsequent approval of it by a state court, were induced by the trustee's misrepresentations, concealment or failure to disclose material facts, and on the further ground that the attorney purporting to represent the three beneficiaries in the state court proceeding was not authorized to represent two of them, an instruction that "Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them", is tantamount to instructing a verdict for the trustee

---

[1] The record in the Court of Appeals has been certified to this Court and will be cited as "R" preceded by the number of the printed volume, such as I R., II R., etc. The minutes of the state court hearing marked in the District Court as defendant's Exhibit 127, which was part of the record in the Court of Appeals but not printed and after denial of the motion for rehearing returned by the Clerk of the Court of Appeals to the attorneys for the Bank, will be cited as defendant's Exhibit 127.

on every issue determined by the state court judgment (except Kelton's representation of James and Michael), in the absence of any instruction that the state court judgment was not binding on any of the beneficiaries if the jury found that it was induced by the trustee's misrepresentations, concealment or failure to disclose one or more material facts. *Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625.

2—Whether in submitting special issues to a jury under Rule 49(a) of the Federal Rules of Civil Procedure, in an action by the three beneficiaries of a trust against their trustee for damages for the sale by the trustee to itself of a trust asset, on the ground that such beneficiaries' consent to such sale, and the subsequent approval of it by a state court, were induced by the trustee's misrepresentations, concealment or failure to disclose material facts, Rule 49(a) of the Federal Rules of Civil Procedure requires the submission to the jury of a special issue in respect of the trustee's alleged failure to disclose material facts, notwithstanding the submission of a special issue in respect to the trustee's alleged misrepresentations and concealment of material facts and an instruction that a "trustee * * * has a duty to impart to the beneficiary all material facts in dealings between the trustee and the beneficiary", and whether a failure to submit such issue to the jury notwithstanding the beneficiaries' demand therefor, violated Rule 49(a) when there is substantial evidence of the trustee's failure to disclose material facts. *Tilman* v. *Great American Indemnity Co.*, 207 F. 2d 588 (7th Cir. 1953); *Palmiero* v. *Spada Distributing Co.*, 217 F. 2d 561 (9th Cir. 1954).

3—Whether, when an allegation of a complaint is admitted by the answer and by testimony on behalf of the defendant, the usual course of judical proceedings in federal courts requires that the jury be so advised in response to its inquiry during its deliberations as to whether there is any testimony in respect of such matter, where the

Court's attention is specifically drawn to such pleadings and testimony. *U.S.* v. *Jackson,* 257 F. 2d 41 (3rd Cir. 1959).

4—Whether when in the course of a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, the judge who later tried the case, after denying a motion to dismiss the complaint and concededly knowing the pleadings only, expressed the view that it was "improbable" that she would grant the equitable relief prayed for in the complaint, and that the plaintiff "just wants some money. I don't know what she wants with any more money. She's got all she can possibly use", exhibited such bias and prejudice as to preclude a fair trial, and whether in holding that a contention that the trial court had "prejudged" the case when it later ruled out all equitable claims, was "without merit", the Court below sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

5—Whether the due process requirements of the 14th Amendment are met, and a state court acquires personal jurisdiction over beneficiaries of a trust in an action to approve a sale by the trustee to itself of trust property, where there is no service of process, an attorney appearing on behalf of the trustee also purports to appear on behalf of such beneficiaries and such beneficiaries did not authorize such attorney to appear on their behalf and whether the motion of such beneficiaries in an action by them against the trustee for damages arising from such sale for a directed verdict or their motion, after an adverse verdict, for judgment notwithstanding the verdict, was required to be granted. *Armstrong* v. *Manzo,* 380 U.S. 545; *Griffin* v. *Griffin,* 327 U.S. 220; *Schroeder* v. *City of New York,* 371 U.S. 208; *Cooper* v. *Newell,* 173 U.S. 555.

Constitutional Provisions and Federal Rules Involved

1—14th Amendment to the Constitution of the United States, § 1, insofar as material, provides as follows:

> " * * * nor shall any state deprive any person of life, liberty or property, without due process of law, * * *."

2—Federal Rules of Civil Procedure, insofar as material, provide:

> "Rule 7 (a) *Pleadings.* There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."
>
> "Rule 8 (d) *Effect of Failure to Deny.* * * * Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."
>
> "Rule 15 (b) *Amendments to conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. * * *"
>
> "Rule 49 (a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the

jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. * * *"

Statement

Petitioner Cornelia Grey ("Mrs. Grey") is the life tenant, and petitioners James and Michael Grey ("James" and "Michael"), her sons, are the remaindermen of a trust known as the O'Connor Trust of which respondent, First National Bank in Dallas (sometimes "the Bank") has been successor trustee since August 1954.

Prior to the end of December 1960, the O'Connor Trust, the Morgan Trust—a charitable trust—of which the Bank was and is also successor trustee, and Mrs. Grey individually were tenants in common of certain parcels of real estate in Dallas, Texas, including the A'Mell Building. Mrs. Grey's individual interests in such properties were also managed by the Bank as her agent (I R. 41, 176-177).

The A'Mell Building comprised 17,500 square feet of the 80,900 square feet contained in City Block 60, and was the largest of the twelve parcels in such block, save only the 25,000 square foot parcel owned by the Bank in its private capacity and occupied by its Motor Bank (V R. 78). The Bank's main building was located in a block facing Block 60 (V R. 122-123). On March 3, 1960, the Bank embarked on a program of acquiring the whole of Block 60 as the site of its contemplated new bank and office building and to that end had obtained letters of intent from the owners of five parcels by April 25, 1960, and received a sixth the following day (V R. 75-77; V R. 226-228; V R. 228-229; VII R. 737-740; VII R. 740-744; VII R. 745-748).

On April 25, 1960, the Bank first informed Mrs. Grey of its interest in acquiring the A'Mell Building, but nothing was said as to price (V R. 69, 70; I R. 62, 186). At the

same time, it was represented to Mrs. Grey that if the Bank could not acquire the entire Block 60, it would build its new building elsewhere (I R. 62, 186; V R. 69), although no other location was in fact being considered by the Bank (II R. 674, 675, 678, 894, 897). After having unsuccessfully attempted on May 11, 1960 to secure Mrs. Grey's consent to a sale of the A'Mell parcel at a price per square foot lower than the prices the Bank was prepared to pay for the other parcels in the Block 60 (I R. 62, 185-186; V R. 61), the Bank's negotiations with Mrs. Grey were resumed on September 13, 1960, and culminated on September 16, 19, 1960 in a written agreement between Mrs. Grey and the Bank for the sale of the A'Mell parcel to the Bank for $1,155,000, *i.e.* at $66 per square foot, to be effected by the partitioning of the A'Mell parcel at that valuation to the Morgan Trust, and of all the other properties held in common to Mrs. Grey individually and to the Bank as Trustee of the O'Connor Trust, as tenants in common (I R. 106-123). The Agreement provided that the Bank would purchase the A'Mell parcel from the Morgan Trust, and that the whole transaction was subject to the approval of the state court in a proceeding under Art. 7425-b, sections 12 and 24 E of Texas Rev. Civ. St.[2] Mr. Grey agreed to file an answer in such proceeding praying that the agreement be approved and that she would recommend to the remaindermen that they file similar answers. The agreement was signed for "approval and ratification" by James on September 19, 1960 and by Michael on October 5, 1960 (I R. 123).

On November 19, 1960, the Bank in its private capacity commenced the contemplated proceeding in the state court for the approval of the transaction, naming as defendants itself as Trustee of both the O'Connor and Morgan Trusts, Mrs. Grey, James and Michael and, because of the

---

[2] The pertinent portions of these statutes are set forth in Appendix "B" hereto (pp. 1b to 3b).

charitable nature of the Morgan Trust, the Attorney General of Texas (VII R. 647-656). None of the Greys (petitioners here) was served with process, nor was any notice of the state court hearing given to James or Michael, even though the Bank was well aware of their addresses (VII R. 639-641). At the Bank's suggestion, and with the acquiescence of Mr. Dorsey, Mrs. Grey's then New York attorney, Mr. Kelton, a Dallas lawyer, who had been retained by the Bank to represent it as Trustee of the O'Connor Trust in such proceeding, appeared also for all of the petitioners herein, and filed a joint answer on behalf of the Bank as Trustee and of the petitioners herein, admitting all the allegations of the Bank's complaint and joining in the Bank's prayer, in its private capacity, for the approval of the proposed transaction (VII R. 656-8).

The proceeding was, as the Bank's General Counsel has described it, "a friendly suit", in which the Bank was "suing" itself (VII R. 641-3; II R. 793), and Mr. Kelton, who never consulted with Mrs. Grey, James or Michael, and knew nothing of the background of the matter other than what the Bank chose to tell him, was content to let the "facts" be developed at the hearing (held nine days after the filing of the complaint) by counsel for the Bank in its private capacity, which the latter did wholly by means of conclusions (IV R. 1772-1783; Def. Exh. 127). On the basis of such "facts", the Texas Attorney General gave his consent, and the court duly entered judgment as prayed for (III R. 1491-1492; I R. 124-137).

The partition was thus effected, and by deed dated December 30, 1960, the Bank as Trustee of the Morgan Trust conveyed the A'Mell parcel to itself in its private capacity (VII R. 706). Thereafter, Mrs. Grey had occasion to review the transaction and came to the conclusion that there was reason to believe that either the Bank had misrepresented certain facts to her, or had failed to disclose others to her, or both. Accordingly, her new New York attorneys wrote the Bank on April 28, 1961 that, on the basis of their pre-

liminary investigations, it was their opinion that the partition and sale agreement was invalid and unenforceable, and that the Bank would be acting at its sole risk and peril in dealing with the A'Mell Building (V R. 54). Nevertheless, the Bank thereafter demolished it and proceeded with the construction of its new bank and office building in part on its site.

Following the completion of an extensive investigation, on May 16, 1963, the petitioners commenced this action in the United States District Court for the Northern District of Texas, Dallas Division, in effect to set aside the state court judgment and to rescind the partition and sale agreement, or, in the alternative, for damages, on the ground that the Bank had misrepresented the material facts and had concealed or failed to disclose others, both in the negotiations leading to the agreement and in the state court proceeding, and further on the ground that the state court lacked jurisdiction of the person of both James and Michael (I R. 39-105). The Bank denied the allegations of the complaint and pleaded as one of its affirmative defenses that it had made "full disclosure" (I R. 176-224, 206-209). The District Court denied the Bank's motion to dismiss the complaint prior to the trial (I R. 151-155, 158), as well as its motion for a directed verdict against all the plaintiffs (the petitioners here) at the close of the plaintiffs' (the petitioners here) case (III R. 1470-1471). Nevertheless, in so doing, the District Court ruled *sua sponte*:

> "I would like to say, however, that I am not going to submit anything to the jury with reference to the State Court case except the question of authority of Mr. Kelton, and that really the effect of the submission that I have in mind is that I am affirming or saying that the partition and sale is approved as far as Mrs. Grey and the O'Connor Trust is concerned, and that the only thing that I am submitting to the jury is the issue of damages.
>
> I am not sure that I am making myself clear, but I think that there are two reasons why there are no grounds for setting aside the partition—one is that

I do not think that it would be equitable to do it, and the second is that it has been approved by the State Court, and that the O'Connor Trust and Mrs. Grey were represented, and the lawyers who represented them were authorized to act, so that I see nothing to submit to the jury as far as partition and sales agreement is concerned."

Now, do I make myself clear?" (III R. 1471)

In so ruling, the District Court made come true its earlier prediction, announced after the denial of the Bank's motion to dismiss the complaint, and when its knowledge was limited to the pleadings, that:

"The Court:

* * *

"I can't visualize myself setting aside this agreement and putting the property back in the names of Mrs. Grey and these Trusts. That just is inconceivable to me. It is also pretty inconceivable that I will set aside that judgment of the State Court. * * * Maybe the word 'inconceivable' isn't exactly the word I ought to be using because it is conceivable I might do it.

Mr. Stephens:

Improbable.

The Court:

It is improbable—yes—that I would."

* * *

"She [Mrs. Grey] doesn't want the property back, she just wants some money. I don't know what she wants with any more money. She's got all she can possibly use."[3] (IV R. 1809, I R. 33).

However that may be, consistently with her ruling (but inconsistently with her denial of the Bank's motion for a

---

[3] Significantly, the remarks following the asterisks were deleted from the certified transcript of the pretrial conference, and were not incorporated therein until after a hearing on petitioners' motion to correct the record, which included the taking of the testimony of the court reporter, who finally released two typed pages containing the above quoted remark of the District Judge (I R. 27, 32-33).

directed verdict against Mrs. Grey), the District Court instructed the jury that:

> "Insofar as the State Court case is concerned Mrs. Grey, individually, and as a beneficiary of the O'Connor Trust, is bound by the Judgment approving the partition and sale of the properties here concerned. If you find by a preponderance of the evidence that Philip Kelton did not have authority to act for James C. or Michael C. Grey, they will not be bound by the State Court Judgment, and the partition and sale will not be effective as to them as Remaindermen of the O'Connor Trust, unless the entry of judgment was consented to by them or the partition and sale agreement was later ratified by them." (I R. 292).

In overruling petitioners' contention that such instruction improperly withheld from the jury the issue whether the state court judgment was induced by the Bank's misrepresentations, concealment or failure to disclose material facts, the Court below completely ignored the District Court's clearly expressed purpose to withhold such issue from the jury, saying, p. 16a, *infra*, 393 F. 2d at 382:

> "Finally, appellants claim that the court's instruction that Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them was tantamount to instruct a verdict for First National on the issue of fraud and damage. Again we find no merit in this objection. The court's charge, taken as a whole, shows that the issue of the state court's jurisdiction was completely separate from the issue of whether First National fraudulently obtained that judgment. The distinction is also clear from the special interrogatories; Special Issue No. 1 went to Kelton's authority; Special Issues Nos. 2 and 3 to the alleged concealment or misrepresentation. We therefore see no basis for appellants' contention that the jury might have believed that if it answered 'yes' as to Kelton's authority, it was bound to answer 'no' as to fraud."

In relying for its conclusion on the submission to the jury of Special Issues 2 and 3,[4] the Court below failed to recognize that the judgment of the state court, which was received in evidence for all purposes except whether Kelton was authorized to appear for James and Michael (II R. 795, 796), expressly recited its findings (I R. 129), that the Bank had made a full and frank disclosure of all relevant facts known to it. Obviously, the submission to the jury of Special Issues 2 and 3 was in this circumstance wholly meaningless, for if, as the Court clearly instructed the jury, Mrs. Grey was "bound" by the state court judgment, and James and Michael were similarly "bound" by it if Kelton was authorized to appear for them, the jury had no choice but to return verdicts on Special Issues 2 and 3 in conformity with the state court judgment. The holding of the Court below that the instruction in question related only to the "jurisdiction" of the state court, and not to whether the findings recited in the state court judgment could be disregarded by the jury, finds no support in the District Court's charge, is belied by the trial judge's express ruling, and could not have been reasonably so understood by the jury. Certainly, there is nothing in the charge which expressly or even impliedly instructed the jury that the petitioners here would not be "bound" by the state court judgment if the jury found that it had been induced by misrepresentations, concealment or failure to disclose material facts (I R. 289-304).

---

[4] *Special Issue No. 2*: "Do you find from a preponderence of the evidence that the First National Bank in furnishing information to Mrs. Grey, James Grey and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the state court of November 28, 1960 made any material misrepresentations?"

Special Issue No. 3: "Do you find from a preponderence of the evidence that the First National Bank in the negotiations with Mrs. Grey, James Grey and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the state court of November 28, 1960, concealed any material facts?" (I R. 297, 298).

The Court below affirmed the trial court's refusal to grant the motions of the petitioners here for a directed verdict, and for judgment notwithstanding the verdict, and concluded that, in any event, the petitioners herein were not "prejudiced" by such rulings (pp. 16a-17a, fn. 12, *infra*, 393 F. 2d at 382, fn. 12), because of the jury's negative responses on Special Issues 5 and 11.[5] But, here again, the Court below failed to perceive that the trial court's instruction quoted above, that "Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them" (p. 16a, *infra*, 393 F. 2d at 382), permitted of no other verdicts on these issues. For, if the state court judgment was binding, there, as we have seen, were no "misrepresentations" or "concealment" on which damages could be predicated (I R. 129) and the judgment of the state court recited its conclusion that the price paid by the Bank for the A'Mell parcel was "fair" (I R. 130).

The Court below (pp. 14a-15a, *infra*, 393 F. 2d at 381), saw no inadequacy in the trial court's failure to include in its charge, notwithstanding the demand of the petitioners here in accordance with Rule 49(a) Fed. Rules Civ. Proc., a special issue with respect to the Bank's alleged failure to disclose material facts, in addition to those (Nos. 2 and 3) with respect to the Bank's alleged misrepresentations and concealments of material facts, though the issues of misrepresentations, concealments and failure to disclose material facts had been very extensively tried without any objections being interposed by the Bank to the admission of evidence of its failure to disclose. The Court below rested its conclusion on fragments of the trial court's

---

[5] *Special Issue No. 5*: "Do you find from a preponderence of the evidence that Mrs. Grey, James C. Grey, or Michael C. Grey were damaged by such misrepresentations, if any, or concealments, if any?" (I R. 289-299).

Special Issue No. 11: "Do you find from a preponderence of the evidence that the A'Mell Building had a fair market value in excess of $1,155,000 on September 19, 1960?" (I R. 301).

charge to the effect that the Bank contended that "it made a full disclosure of all material facts", that a trustee "had a duty to impart to the beneficiary all material facts in dealings between the trustee and the beneficiary" and that, "there must be fair dealing and good faith by the Trustee toward the beneficiary." But, whatever these fragments from the Court's instructions may add up to, they are clearly no substitute for the submission to the jury of a special issue as to whether the Bank made a full disclosure of all material facts. Moreover, although a fiduciary's unintentional failure in good faith to disclose a material fact to his beneficiary is no less actionable than a misrepresentation or a concealment of a material fact in bad faith[6] the trial court's "good faith" instruction afforded the jury no basis for considering "concealment", which connotes bad faith[7] as encompassing failure to disclose.

The jury interrupted its deliberations to submit to the District Judge a written inquiry as follows:

> "Was their (sic) any testimony to indicate whether the bank told Mrs. Grey or her attorney that Mr. Majors owed the First National Bank $650,000.00 on the Republic Garage building." (I R. 362).

This inquiry related to a parcel in Block 60 acquired by the Bank, and went directly to the question of the accuracy of a crucial item in the schedule of prices paid by the Bank for parcels in that block, in reliance on which Mrs. Grey agreed to the price specified for the A'Mell parcel in the partition and sale agreement (I R. 138-140).

---

[6] This is elementary under Texas Law. *Langford* v. *Shamburger*, 417 S.W. 2d 438 (Tex. Civ. App. 1967); *Murphy* v. *Carthwright*, 202 F. 2d 71 (5th Cir. 1953) on appeal from U.S. District Court for the Western District of Texas.

[7] *Bates* v. *Prebble*, 151 U.S. 149, 159-163, *Wood* v. *Carpenter*, 101 U.S. 135, 143; *Service Life Ins. Co.* v. *Weinberg*, 81 F. 2d 359, 361 (7th Cir. 1936) 3 Pomeroy's Equity Jurisprudence (5th Ed.) Section 900.

Although the trial court's attention was promptly called to the circumstance that it was admitted by the Bank in its answer that it had not made disclosure to Mrs. Grey or her attorney of Majors' indebtedness to it secured by the Republic Garage Building (I R. 363, 64, 65, 67, 190), and that the Bank's president and senior vice president had, as witnesses for the Bank, confirmed such admission (II R. 499, 505; III R. 1016), the judge declined to answer the jury's inquiry informing them only that "The Jury is the exclusive judge of the evidence" (I R. 364). Nevertheless, the Court below, in holding that the District Court's reply was "an appropriate one", strangely said (p. 24a, *infra*, 393 F. 2d at 386):

> "• • • In order to answer the question on the merits, the judge would have had to review over 2,000 pages of transcript and 400 exhibits and, in the absence of direct testimony, draw an inference as to the proper answer. This would have been an insurmountable burden. As an alternative, the judge could simply have tried to recall the evidence and evaluate its significance, but in so doing she would have been acting as a 13th juror."

Obviously, the Court below was thinking of some other case.

In regard to the issue whether Kelton was authorized to appear for James and Michael in the state court proceeding, the Court below said, in affirming the judgment of the District Court (p. 21a, *infra*, 393 F. 2d 385):

> "James was personally present and actively participated in the September negotiations in Dallas; at that time Dorsey purported to speak for 'Mrs. Grey and her sons' and James did not deny his authority to do so. Michael testified that he left the management of his interest to his mother and never disagreed with her about such matters. Mrs. Grey told Dorsey (in front of James) to direct all correspondence about the Partition and Sale Agreement to her and 'she would take it up with the boys.'

> Indeed, the letter Dorsey wrote Mrs. Grey in November 1960 saying that he had authorized Kelton to represent her and her sons reached her in Paris where she was staying with both of her sons. Thus the jury could reasonably have found that the Dallas transaction was a family affair, that the mother spoke for the family, and that Dorsey was the family attorney protecting the family interests."

But the partition and sale agreement (I R. 106, 116), in expressly providing that "Mrs. Grey will recommend to the Remaindermen that they file an answer in such proceeding containing a similar prayer", *i.e.*, joining in the prayer for relief contained in the complaint, clearly negates any possibility of an inference that the "mother" spoke for "the family", *i.e.*, that Mrs. Grey was authorized to act for James and Michael. Moreover, while she received Dorsey's letter to which the Court below refers, she never mentioned the matter to James or Michael (III R. 1281-1284), neither of whom was aware of Kelton's purported representation of them, or, indeed, of Kelton's very existence (II R. 517, 518, 564, 565; III R. 1461).

Nor is the Court below on any more solid ground in regard to Dorsey's being "the family attorney protecting the family interest". "The family", as such, had no interest, although each of the three members of the family had his own interest in the matter. Indeed, while Dorsey first testified that he "assumed" that he represented James and Michael, he later explained that "I should not have used the word 'assumed'. I was representing James and Michael at that time in another matter" (III R. 1246). Obviously, Dorsey's representation of James and Michael in "another matter" gave him no authority to authorize Kelton to act for them in this one.

Moreover, the Court below distorts the record when it says, in an attempt to lay a foundation for its conclusion that Dorsey was James' lawyer in the matter (p. 21a, *infra*, 393 F. 2d 385), that during the September negotiations,

"Dorsey purported to speak 'for Mrs. Grey and her sons' and James did not deny his authority to do so" and that while flying from Dallas to New York after the conclusion of the partition and sale agreement, "Dorsey explained the various provisions of the agreement first to Mrs. Grey and then to James". However, there is no testimony in the record that James ever heard Dorsey stating that he was speaking for him and his brother, so that there was no occasion for James to deny it. Similarly, Dorsey's testimony is explicit that he went over the agreement on the plane with Mrs. Grey, but that James was not "seated or situated in such a manner that he could hear or overhear the conversation between Dorsey and Mrs. Grey (III R. 1232-1234). There is no testimony in the record that Dorsey explained the agreement to James then or at any other time. The Court below also distorts the record when, as a basis for its conclusion that there was sufficient evidence for the jury to have based its verdict in this regard on Mrs. Grey's authority to act for Michael, and says, p. 21a, *infra*, 393 F. 2d 385, that "Michael testified that he left the management of his interest to his mother and never disagreed with her about such matters." On the contrary, Michael testified (II R. 521):

> "Q. So, now getting to the property in question, you had known all of your life that your brother and you had valuable interests in Dallas, haven't you? A. No, sir, I did not.
>
> Q. Didn't your mother explain to you, sir, and your brother, many times that she only got the income from this property in Dallas, and on her death it was yours, sir?
>
> * * *
>
> A. She explained that she had properties in Dallas. My understanding from her explanation was, one day we didn't have much, she so worded it. My mother wanted us to believe that we had to go and earn our own money rather than wait for an inheritance.
>
> * * *

Q. Is it true, sir, that from the beginning of time you had never disagreed with your mother about the handling of the Dallas property? A. I never argued with her about it. She never talked much about it—I never talked with her much about it.

Q. Have you ever disagreed with her, sir?

* * *

A. Not to my recollection, sir.

Q. What have you argued with her about the Dallas property? A. I haven't argued anything about it.

Q. Well, you have been in complete accord with her, then, is that it? A. Well, I never discussed Dallas matters with her, sir.

Q. Then, you have never mentioned it one way or the other from the beginning of time up until now, is that what you mean?

* * *

A. Yes, sir, that's what I mean." (II R. 575-6)

It follows that the conclusion of the Court below on this issue is not only wholly unsupported, but contrary to record facts and rests on one insupportable inference drawn from another.

The Court below, moreover, utterly failed to draw the proper conclusion of law from the circumstance expressly noted by it, p. 9a, *infra*, 393 F. 2d at 378 that in the state court proceeding there was, unavoidably, a basic conflict of interest between the Bank as trustee and James and Michael as remaindermen of the trust, which necessarily disqualified Kelton from representing both the Bank and the remaindermen. Clearly, where such an obvious conflict of interest exists, an attorney—client relationship, contrary to public policy, is not to be inferred on such grounds as the Court below advances. Indeed, as hereinafter demonstrated at p. 32, *infra*, even express employment of a lawyer in such circumstances does not suffice to vest him with an attorney's usual authority, since he is disqualified to exercise it.

REASONS FOR GRANTING THE WRIT

I

Whether the charge to the jury that "Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them" was tantamount to instructing a verdict for the trustee on every issue determined by the state court judgment other than Kelton's representation of James and Michael, is a federal question which the court below decided in a way in conflict with this Court's decision in *Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625.

The Court below held that the Trial court was required to submit to the jury the issue as to whether the judgment of the state court had been obtained by respondent Bank's fraud (infra, p. 12a, 393 F. 2d at 380).[8] Nevertheless, the Court below found no reversible error in the instruction given to the jury by the trial court that "Mrs. Grey was bound by the state court judgment and that James and Michael Grey were likewise bound by it unless the jury found that they had not authorized attorney Kelton to represent them in the state court," *infra*, p. 16a, 393 F. 2d at 382.

---

[8] The record of the State Court hearing is clear that Mrs. Grey and James were prevented by the Bank's failure to disclose facts bearing upon the proposed purchase by it of trust property and upon the sales price thereof from knowing of the defenses they could have interposed at the state court hearing, and that Michael did not even know of his rights and received no information whatsoever relating to the proposed transaction and that none of such facts were revealed to the Attorney General of Texas or to the state court itself. These facts clearly constituted extrinsic fraud invalidating a judgment under the doctrine of *U.S.* v. *Throckmorton*, 98 U.S. 61. Moreover, they constituted fraud upon the state court itself. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238.

In rejecting petitioners' assignment of error that such instruction withdrew from the jury all the issues of fraud and damage and left for the jury's determination only the issue of Kelton's authority, the Court below reasoned, p. 16a, *infra*, 393 F. 2d at 382, that the charge, taken as a whole, treated the issue of the state court jurisdiction separately from the issue of fraud in obtaining the judgment and submitted to the jury separate special interrogatories on such issues.

In so holding, the Court below disregarded the decision of this Court in *Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625, and misapplied Rule 49(a) of the Federal Rules of Civil Procedure.

Indeed, viewed from the standpoint of the jury, as it must be, the instruction that Mrs. Grey was "bound" by the state court judgment and that the remaindermen were likewise so "bound", if Kelton had authority to represent them, necessarily meant that the plaintiffs (petitioners here) had no right to challenge, or make any contention contrary to, any of the recitals in the state court judgment except those relating to Kelton's representation of James and Michael. That judgment, read to the jury in its entirety (I R. 124) recited as findings that the Bank "has made a full and frank disclosure of all relevant facts known to [the Bank] touching the value of the [A'Mell Building] and all other circumstances known to [the Bank] bearing on the fairness of the partition and sale" (I R. 129) and that the sale of the A'Mell Building to the Bank for $1,155,000 was fair and equitable and in the best interests of the Morgan and O'Connor Trust (I R. 130-131).

Hence, the Trial Court's instruction left no alternative to the jury but to answer in the negative all the special issues relating to misrepresentations, concealment, damages resulting from misrepresentation or concealment, if any, the fairness and equitable nature of the agreement in suit and the market value of the A'Mell Building (Special Issues Nos. 2, 3, 5, 7, 10 and 11, I R. 299-301). Clearly, no jury could have understood the Trial Court's instruction

as merely referring, as the Court below asserts, to the question of the state court's personal jurisdiction over Mrs. Grey and her sons. The charge to the jury may be searched in vain for any explanation or even intimation that in stating that Mrs. Grey and her sons were bound by the state court judgment, the Trial Court meant that they could not be so bound if the jury found that such judgment had been obtained by fraud.[9]

The decision of the Court below is, accordingly, in conflict with the decision of this Court in *Callen, supra.* There, the defendant railroad pleaded as a defense in an employee's personal injuries action a release executed by him. Although the issues as to the permanency of his injuries and as to whether the release was induced by the mutual belief that the injuries had no permanent effect were sharply controverted, the trial judge instructed the jury that both sides had agreed that the release was not in contemplation of permanent injuries and, therefore, was not binding, except to the extent of $250 paid in consideration thereof. Even though the trial judge—unlike the District Court here—made an effort later in the charge to correct these errors, by instructing the jury that the release would be binding if it found that the employee had been aware of the permanent nature of his injuries or if the release was based in part on the question of liability

---

[9] It is obvious that in an action such as here to set aside a judgment for extrinsic fraud, the plea of res judicata is not available. This principle is well settled under Texas Law, which is controlling here under *Erie, Brammer & Wilder* v. *Limestone County,* 24 S.W. 2d, 99, 105 (Tex. Civ. App. 1929); *Re Garcia* v. *San Antonio & A. P. Ry. Co.,* 77 S.W. 275 (Tex. Civ. App. 1903, writ ref.). The same principle is followed by Federal courts. *Earll* v. *Picken,* 113 F. 2d 150, 158 (C.A.D.C. 1940); *Grummons* v. *Zollinger,* 240 F. Supp. 63, 75, aff'd 341 F. 2d 464 (7th Cir. 1965); *Dana* v. *Morgan,* 232 F. 2d 85, 89 (2nd Cir. 1916); *Liken* v. *Shaffer,* 64 F. Supp. 432, 444 (D.C. Iowa 1946); *United States* v. *Jerome,* 115 F. Supp. 818, 821 (D.C.S.D. N.Y. 1953).

and that the issue of permanency of the injuries should be determined by the jury, the Court of Appeals for the 3rd Circuit, observing that in attempting to correct his erroneous instructions, the trial judge had failed to tell the jury on his own motion that clear and convincing evidence of mutual mistake of a material fact was required to void the release, reversed the judgment in favor of the employee on the ground that the instruction as to the non-binding effect of the release improperly withdrew from the jury the controverted issue of fact of the validity of the release and predetermined the issue as to the nature of the injuries, 162 F. 2d 832.

In affirming the decision of the Court of Appeals this Court said, 332 U.S. 628-9:

> "The Circuit Court of Appeals, quite rightly we think, construed the charge of the District Judge as withdrawing the question of validity of the release from the jury and said: 'This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries.'
>
> * * *
>
> "It is apparent that the jury accepted the instructions of the court on the subject of the release. Returning, they rendered a verdict 'for the plaintiff, and assessed the damages at $25,240.00, of which the Railroad is to be reimbursed with $250.00.' * * * Under the instructions they had received, there was little else that the jury could do, for the court had withdrawn from them the issue as to the validity of the release and consequently had given them no instructions as to the law that should govern the determination of any such question."

The Court below, by emphasizing that the charge should be taken "as a whole" proceeded on the theory that what-

ever may have been the jury's understanding of the instruction that Mrs. Grey was "bound" by the State court judgment and James and Michael "bound" by it subject to the determination of the issue of Kelton's authority, the submission of the jury of a special issue as to misrepresentations or concealments "leading" to the state court judgment enabled the jury to freely arrive at a verdict on that issue. Such a theory misapplies the principle that an erroneous instruction may be rendered harmless by another correct instruction in the charge, by assimilating a correct special issue submitted to the jury under Rule 49(a) of the Federal Rules of Civil Procedure to a corrective instruction. Indeed, under Rule 49(a), an erroneous instruction necessarily governs the jury's answer to the special issue and, therefore, far from being rendered harmless, pervades the jury's verdict. Rule 49(a) provides that the court shall "give to the jury such explanations and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." Here, the District Court expressly stated in its charge that the jury was required "to answer the * * * special issues *in accordance* with the instructions * * *" (I R. 297) (emphasis supplied).

In view of the conflict of the decision of the Court below with the decision of this Court in *Callen* and in view of the widespread use of special verdicts under Rule 49(a) Fed. Rules of Civil Proc. in several circuits, it is important in the proper administration of justice in Federal courts that this Court, which has not had an occasion to do so, makes it clear that under Rule 49(a) an erroneous instruction is not rendered harmless by the submission of a proper special issue, but, on the contrary, that an erroneous instruction necessarily governs or at least affects the jury's answer to the special issue.

II

The refusal of the trial judge to submit to the jury under Rule 49(a) Fed. Rules Civ. Proc. a special issue as to the trustee's failure to disclose to the beneficiaries and to the state court material facts relating to the sale by the trustee to itself of trust property approved by the state court, separately from special issues as to the trustee's misrepresentations and concealment, where the issue of failure to disclose was raised by the trustee's pleadings and supported by substantial evidence received without objections, is an important federal question which has not been, but should be settled by this Court and which the court below decided in a way in conflict with decisions of other courts of appeals.

As shown above in the "Statement", pp. 13 & 14, *supra*, the Court below, in overruling petitioners' assignment of error relating to the refusal of the District Court to submit to the jury, as requested by petitioners, a special issue as to the Bank's failure to disclose material facts in addition to the special issues as to misrepresentations and concealment, held that the District Court's charge "considered as a whole * * * did charge the jury that at issue was [the Bank's] failure to disclose", pp. 14a-15a, *infra*, 393 F. 2d at 381 and that the petitioners could not complain of the omission of a separate issue of failure to disclose because in their complaint they had not always clearly distinguished concealment from failure to disclose, p. 15a, *infra*, 393 F. 2d at 381-382.

The first reason given by the Court below is again predicated upon a confusion between instructions to the jury and the special issues submitted to it under Rule 49(a) of Federal Rules of Civil Procedure. Even if the instructions to the jury as to that issue were correct—and as shown above, p. 14, *supra*, they were not in view of the erroneous injection of the element of the trustee's good

faith in its dealings with the beneficiaries, they could not cure the omission of a special issue expressly requested by the petitioners (I R. 349), since a correct instruction no more enables the jury to determine an omitted special issue than a proper special issue renders harmless an erroneous instruction.

The holding of the Court below on that point is in conflict with the decisions of the Court of Appeals for the Seventh Circuit in *Tilman* v. *Great American Indemnity Co. of New York*, 207 Fed. 2d 588 and in *Mickey* v. *Tremco Mfg. Co.*, 226 F. 2d 956 and for the Ninth Circuit in *Palmiero* v. *Spada Distributing Co.*, 217 F. 2d 561, where it was held in accordance with Rule 49(a) Fed. Rules Civ. Proc.[10] that when a trial court submits to the jury special verdicts, all material factual issues should be covered by the questions submitted.[11]

In predicating in part its holding on the wording of the complaint, which charged the Bank with deliberate withholding of material facts in bad faith, and, therefore, alleged concealment, the Court below disregarded the fact that the Bank's affirmative defense of full disclosure of all the material facts (I R. 206-209) raised the issue of nondisclosure in addition to the issue of concealment. Indeed under Rule 8(d) of Federal Rules of Civil Procedure, any averment in the pleading "to which no responsive pleading is required or permitted" is deemed denied, and under Rule 7(a) no responsive pleading was permitted to the Bank's affirmative defense.

---

[10] Rule 49(a) insofar as material, provides: "If * * * the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted *unless before the jury retires he demands its submission to the jury.*" (Emphasis supplied.)

[11] The *Tilman* case was quoted with approval by another panel of the Fifth Circuit in *Angelina Casualty Co.* v. *Bluit*, 235 F. 2d 764, 777.

The Court below also disregarded the amendment of the complaint during trial which the District Judge directed the petitioners to file notwithstanding Rule 8(d) (III R. 1031-2), in which petitioners alleged "Bank's failure to apprise any plaintiff [the petitioners here] of factual knowledge within the Bank's possession concerning development plans for City Block 232 [the block across the street from Block 60]" (I R. 149).

Moreover, the Bank's own officers admitted at the trial —without any objection being interposed—failure to disclose certain facts, claiming that such failure was unintentional (I R. 473, II R. 510, 672, 680, 883, III R. 1016, 1026, 1027, 1032-1033), which under Rule 15(b) Fed. Rules Civ. Proc. resulted in the complaint being deemed amended.

It follows that the issue of non-disclosure as distinguished from misrepresentations and concealment, was raised by the pleadings and the evidence and, accordingly, was required by Rule 49(a) Fed Rules Civ. Proc. to be submitted to the jury.

In view of the conflict between the decision below and the decisions of the Courts of Appeals for the 7th and 9th Circuits and the frequent use of special verdicts, this important question of Federal procedure, which has not been passed upon by this Court, should be determined by it.

III

Whether, where a jury's inquiry to the trial judge relates to the existence *vel non* of testimony in regard to a fact which is the subject of a judicial admission, the trial judge is required to so advise the jury, is an important question of federal procedure which has not been, but should be settled by this Court and which the court below decided in a way in conflict with decisions of other courts of appeals.

As shown above, pp. 14-15, *supra*, the jury's inquiry made during its deliberations, related to the existence of

any testimony in regard to a fact which had been admitted in the Bank's answer and by the Bank's president and senior vice-president at the trial. Nevertheless, and although such admissions were specifically called to the District Judge's attention, she refused to so advise the jury and instead answered its inquiry by stating that it was the sole judge of the evidence, thus implying that there was some testimony the significance and credibility of which was to be determined by the jury (*supra*, p. 15). In upholding the District Court's action, the Court below, disregarding the record, predicated its decision on the "unsurmountable burden" for the trial judge to review over 2,000 pages of transcript and 400 exhibits and the impropriety for the trial judge trying to recall the evidence, p. 24a, *infra*, 393 F. 2d at 386.

The question therefore is as to whether a trial judge is required, in answer to the jury's inquiry, to advise it that there is no dispute as to the fact inquired about, especially when such fact, as here, is of vital importance for the determination of the case and the judicial admission of such fact is specifically called to the judge's attention.

The Court of Appeals for the Third Circuit held in *U.S.* v. *Jackson*, 257 F. 2d 41, 43, that though usually the question of whether the jury's inquiry as to factual matters should be answered rests in the discretion of the Court, a party (there, the defendant in a criminal case), is entitled to have the jury informed as a matter of right when the jury's inquiry relates to a highly material fact not in dispute.

The holding in *Jackson* was followed by the Court of Appeals for the Seventh Circuit in *U.S.* v. *Fiorito*, 300 F. 2d 424, 426-427 and by the Court of Appeals for the Eighth Circuit in *Gregory* v. *U.S.*, 365 Fed. 2d 203, 206.

A similar doctrine has been adopted in civil matters by the highest state courts, and in particular by the highest courts of Wisconsin in *Knipfer* v. *Shaw*, 210 Wis. 617, 624, 246 N.W. 328; of South Dakota in *Wittmeier* v. *Post*, 105

N.W. 2d 67, 70; of West Virginia in *Nixon* v. *Shaver*, 115 W.Va. 49, 175, S.E. 849; of Kentucky in *Milward* v. *Luigart*, 41 S.W. 568, 569 and of New York in *Kerner* v. *Surface Transp. Corp.*, 266 App. Div. 356, aff'd 293 N.Y. 881.

The question whether such doctrine should be applied in Federal courts in civil cases has not been, but, we respectfully submit, should be resolved by this Court in view of its importance for the proper conduct of jury trials in Federal courts and of the conflict between the decision of the Court below and the decisions of the Courts of Appeals for the Third, Seventh and Eighth Circuits.

IV

In affirming the judgment of the District Court below, notwithstanding the trial judge's petulant expression of her bias and prejudice against Mrs. Grey, as well as the trial judge's predetermination of crucial issues in the case without any knowledge of the evidence, the court below has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The remarks of the trial judge are quoted at p. 10, *supra*. Petitioners believe that the matter speaks for itself and calls for no elaboration.

V

Whether the due process requirements of the 14th Amendment are met and a state court acquires jurisdiction over beneficiaries of a trust in an action to approve the sale by trustee to itself of trust property when there is no service of process, and an attorney appearing on behalf of the trustee purports also to appear on behalf of such beneficiaries is a federal question which has not been, but should be settled by this Court.

The Court below predicated its holding that James and Michael had not been denied state due process, notwithstanding the undisputed fact that neither of them was served with process in the state court proceeding (VII R. 639, 641), upon the special verdict of the jury that Kelton had been authorized to appear for them in that action, pp. 17a-22a, *infra*, 393 F. 2d at 384-385 and on the further ground that the notice requirements of section 24E of the Texas Trust Act, Art. 7425-b Tex. Rev. Civ. Stat.[12] were satisfied by the provisions of the partition and sale agreement that it was conditioned upon the entry of a judgment in a proceeding in the State Court to be commenced as soon as possible, p. 19a, fn. 16, *infra*, 393 F. 2d at 384 fn. 16.

The second ground formulated by the Court below is untenable, since even apart from the prohibition by art. 2224 Tex. Rev. Civ. Stat. of waiver of process or authorization of an appearance by the contract sued on,[13] and the provisions of subdivision D of § 24 of the Texas Trust Act, art. 7425b Tex. Rev. Civ. Stat. which applies to any proceedings under said Act the statutes and rules governing service of process,[14] it is obvious that the agreement here, which contemplated the commencement of an action in the

---

[12] "A court of competent jurisdiction may * * * for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the * * * limitations and restrictions which would otherwise be placed upon him by this Act."

[13] "No acceptance of service and waiver of process, nor entry of appearance in open court * * * shall be authorized by the contract * * * sued on, * * * nor shall such acceptance or waiver be made until after suit brought."

[14] "Except as otherwise provided herein, the provisions of the statutes and rules of court governing such procedure, commencement of action * * * shall govern all actions and proceedings instituted under the provisions of this Act." Subd. E of § 24 involved here does not provide otherwise.

state court at some undetermined date (I R. 116)[15] was not self executing and, therefore, could not constitute waiver of process or an authorization of appearance in the future state court action. *Griffin* v. *Griffin*, 327 U.S. 220, ret. den. 328 U.S. 876.

Nor could it constitute notice, for, as the Court said in *Armstrong* v. *Manzo*, 380 U.S. 545, 550, 552:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the *pendency* of the action and afford them an opportunity to present their objections.
>
> * * *
>
> It is an opportunity which must be granted *at a meaningful time and in a meaningful manner.*" (emphasis supplied)

Accordingly, the question as to whether James and Michael were denied due process in the state court action hinges solely on the issue of Kelton's authority to appear for them.

As noted by the Court below, neither James nor Michael ever spoke or corresponded with Kelton and, therefore, never retained him themselves, p. 19a, *infra*, 393 F. 2d at 384. As shown above, pp. 16-18, *supra*, the evidence is also clear that neither James nor Michael ever expressly retained Dorsey as their attorney in the matter of partition and sale or in regard to the state court proceeding or authorized him to retain another attorney on their behalf and that Dorsey himself based his claim of authority to act for them in said matter solely on his employment by them in another matter wholly unconnected with the partition and sale agreement or the state court proceeding (III R. 1246), which obviously gave him no authority to act for

---

[15] The agreement provided: "As quickly as practicable, the Bank shall prepare and file a petition praying for a judgment as specified in Section 4.01."

them in the latter matter.[16] In the light of these facts, the Court below could find no other basis for the jury's finding of Kelton's authority than the circumstance that Dorsey had written a letter to Mrs. Grey on November 9, 1960 (10 days prior to the commencement of the action) advising her that he had authorized Kelton to represent her and her sons (VIII R. 1135-1136), from which the Court below inferred:

> "that the jury could reasonably have found that the Dallas transaction was a family affair, that the mother spoke for the family, and that Dorsey was the family attorney protecting the family interests," p. 21a, *infra*, 393 F. 2d at 385.[17]

Thus, the theory of the Court below is that there was employment of Kelton by estoppel, not because of anything James or Michael did, but because Mrs. Grey did nothing when advised by Dorsey that he had authorized Kelton to appear for James and Michael. In so reasoning, the Court below completely overlooked the fact that the partition and sale agreement completely negated any authority of Mrs. Grey to act for her sons (I R. 116) and Dorsey's admission that he had predicated his authority solely on his employment by James and Michael in another matter, rather than on any claim that he had been retained by Mrs. Grey to represent her sons (III R. 1246), which he knew she had no authority to do in any matter (V R. 46, 48).

Not only is the holding of the Court below contrary to the record herein and legally unsound, since it implies an attorney's authority on the basis of unsupportable infer-

---

[16] 7 C.J.S. p. 897; *Hotel Longview* v. *Pittman*, 376 S.W. 2d 915 (Tex. Civ. App. 1955, ref. n.r.e.); *Sullivan* v. *Dunne*, 198 Cal. 183, 190; *Greenlaw* v. *Pettit*, 87 Tenn. 467.

[17] As demonstrated above, pp. 16-18, *supra*, the other facts relied upon by the Court below in support of that conclusion are contrary to the record herein.

ences from inferences,[18] but is wholly untenable in the circumstance noted by the Court below, p. 9a, *infra*, 393 F. 2d at 378-379 that attorney Kelton was representing the trustee. Indeed, such representation of adverse and conflicting interests disqualified Kelton from accepting employment by the trust beneficiaries. Under Texas law, even Kelton's express employment by the trust beneficiaries would have been ineffective as a matter of public policy and would have rendered a judgment based on his appearance for the beneficiaries void or at least voidable.[19]

That the due process clause of the 14th Amendment is violated when a state court purports to render a judgment without having acquired jurisdiction of the defendant either by adequate service of process or by an authorized appearance of an attorney on his behalf has been settled by this Court in such cases as *Cooper* v. *Newell*, 173 U.S. 555,

---

[18] This holding of the Court below is strikingly at odds with its holding elsewhere in its opinion that "the fact of agency must be proved and cannot be presumed", p. 23 c, *infra*, 393 F. 2d at 386.

[19] Thus, in *Covey* v. *Knight*, 215 S.W. 2d 684 (Tex. Civ. App. 1948, ref. n.r.e.), the Court said at p. 688 with respect to the representation of the trustee and the remaindermen by the same attorney

> "[the remainderman] are correct in their assertion that J.A. Moore was not qualified to represent them as attorney * * *. That the judgment was voidable can hardly be questioned. * * *"

To the same effect, *Payne* v. *Livingston*, 283 S.W. 701 (Tex. Civ. App. 1923). In *J. W. Hill & Son, Inc.* v. *Wilson*, 399 S.W. 2d 152, 155 (Tex. Civ. App. 1966) the Court held that the representation by an attorney of conflicting interests, even if agreeable to adverse parties, is fundamentally wrong and against public policy. To the same effect, *Bryant* v. *Lewis*, 27 S.W. 2d 604, 608 (Tex. Civ. App. 1930). These cases apply a fortiori here, since not only none of the Greys was ever advised of the conflict of interest between the Bank as trustee and themselves in regard to the transaction here involved, but the very agreement in suit negated such conflict of interest by reciting that the conflict existed only between the Bank in its private capacity and the Bank as trustee (I R. 108).

Griffin v. *Griffin,* 327 U.S. 220, reh. den. 328 U.S. 876 and *Schroeder* v. *City of New York,* 371 U.S. 208.

However, the important constitutional question whether due process is violated when, in the absence of any service of process, the jurisdiction of the state court is based solely on the appearance for the defendants of an attorney disqualified to represent them by reason of his representing in the same action the conflicting interests of the adverse party has not been, but should be settled by this Court.

Conclusion

The Questions raised by this petition are questions of Federal civil procedure of substance, resolved by the Court below in a way not in accord with this Court's decision in *Callen,* or in conflict with decisions of other courts of appeals, a question calling for the exercise by this Court of its power of supervision and an important constitutional question of due process under the 14th Amendment.

The petition should be granted.

Respectfully submitted,

GERALD MEYER
Attorney for Petitioners
477 Madison Avenue
New York, N.Y. 10022

LEON ALEXANDROFF
NEIL A. POLLIO
of Counsel

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22988

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Appellants,

versus

FIRST NATIONAL BANK IN DALLAS, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(March 21, 1968)

Before:

BROWN, *Chief Judge*, and GEWIN and WRIGHT,* *Circuit Judges*.

WRIGHT, *Circuit Judge*: Appellants, Cornelia O'Connor Grey, and her two sons, James Charles and Michael Carter Grey, beneficiaries of the James Charles O'Connor Trust, brought suit against appellee First National Bank in Dallas, Trustee of the O'Connor Trust, in the United States District Court for the Northern District of Texas, alleging

* Of the District of Columbia Circuit, sitting by designation.

First National's complete disregard of its fiduciary duties in fraudulently acquiring trust property for its own use. Appellants sought rescission of a 1960 Partition and Sale Agreement through which the property was acquired. In the alternative, appellants demanded damages, actual and exemplary, based on alleged fraud. The case was submitted to the jury on a special verdict form. On the basis of its findings, judgment was entered dismissing plaintiffs' complaint on the merits. We affirm.

Of crucial importance in this extremely complicated lawsuit are the events preceding the signing of the Partition and Sale Agreement in September 1960 and the circumstances surrounding the Texas state court judgment of November 28, 1960, which approved that transaction, thereby relieving the bank of the restrictions against self-dealing imposed by the Texas Trust Act. Since this appeal presents, *inter alia*, a claim that the District Court erred in not directing a verdict in plaintiffs' favor and in overruling plaintiffs' motion for judgment notwithstanding the verdict, we shall review the evidence in some detail.

I

In 1910 James Charles O'Connor created a testamentary trust for the benefit of his wife, three daughters and grandchildren. His will provided that after the death of his wife the income would be divided equally among his daughters, and as each daughter died, the remainder in that daughter's share would go to that daughter's lawful issue in equal shares *per stirpes* or, in default of such issue, to such person or persons as were designated in that daughter's will. Shortly after his wife's death, one of the daughters died without issue. Her will provided that her third of the trust go in fee simple in equal undivided amounts to her two surviving sisters. The second daughter also died without issue; a settlement arising from a contest of her will provided that almost half of her original interest in the trust go in

fee simple to her sole surviving sister, Mrs. Cornelia O'Connor Grey, with the remainder of her interest being placed in a charitable trust—the Morgan Trust. Thus, of the property originally placed in the O'Connor Trust, 20/60ths. remains in that trust, 19/60ths is owned by Mrs. Grey in fee simple, and the Morgan Trust owns 21/60ths in fee simple. Mrs. Grey is the sole income beneficiary of the O'Connor Trust and her sons, James and Michael, are her lawful issue and therefore the remaindermen to whom the trust properties will be delivered upon the termination of that trust at Mrs. Grey's death.

The principal assets owned jointly by the O'Connor Trust, the Morgan Trust and Mrs. Grey individually are eight downtown Dallas lots. First National has been the successor trustee of the O'Connor Trust since its merger in 1954 with the prior trustee, Dallas National Bank. In addition, since 1954 First National has been the successor trustee of the Morgan Trust and agent for Mrs. Grey under a written agency agreement for the management of her 19/60ths interest in the jointly owned Dallas property.

Prior to the merger of First National and Dallas National Bank, Mrs. Grey, the O'Connor Trust and the Morgan Trust owned Tract 8 (Republic Garage Building) which is west of the center of the block, extending from Pacific Street on the north through to Elm Street on the south, with a frontage on both streets of over 50 feet. First National considered acquiring this property for a proposed motor bank and in 1950 approached Dallas National Bank, Trustee, not directly but through Z. L. Majors, agent for undisclosed principal. The attempted acquisition was unsuccessful, but First National obtained a long term lease on the property immediately adjoining Republic Garage to the east, and began constructing the motor bank and underground passage to connect the motor bank with its main office directly south across Elm Street. Early in 1954, still prior to its merger with Dallas National Bank, First National again considered acquiring a long term lease of

the Republic Garage Building, again using Majors, but this time disclosing the previously undisclosed principal. However, further steps were abandoned since the proposed merger was soon to be effected.

Shortly after the merger, Z. L. Majors, Trustee (now ostensibly acting for the Murchison interests), purchased the lot adjoining Republic Garage on the west (the A'Mell Building). The purchase price of that building was $650,000, the whole amount having been borrowed by Z. L. Majors, Trustee, from First National. When the Murchisons declined to proceed with the transfer and several other potential takers balked, the A'Mell property was offered to Mrs. Grey, the O'Connor Trust and the Morgan Trust in an even trade for their Republic Garage Property. First National's trust officer approved the trade and recommended that Mrs. Grey proceed, without telling her that the money used to purchase the property came wholly from First National, that First National's general counsel represented both the O'Connor Trust and Z. L. Majors, Trustee, and that the appraisal submitted to Mrs. Grey (the so-called Dunham appraisal) was 100,000 in excess of Majors' purchase price.

One month after the exchange of properties, Majors offered to sell Republic Garage to First National for cancellation of the $650,000 debt. First National refused. Subsequently a National Bank Examiner criticized the unsecured loan, as did First National's internal examining committee, for although all interest had been paid when due, there had been no repayment of any part of the principal. Finally First National was given a deed of trust for Republic Garage for the amount of Majors' indebtedness.

Meanwhile, Mrs. Grey became dissatisfied with the A'Mell property; contrary to her expectations and representations made by First National's trust officer, the rental income from the building decreased rather than increased. This, together with other grievances she had stemming from First National's handling of her trust properties,

prompted Mrs. Grey in March 1958 to give notice to First National of her intention to revoke her agency agreement with respect to those properties in which she held an interest individually and to substitute for First National its leading competitor, Republic National Bank of Dallas.

As early as January 1956, First National had tried to persuade Mrs. Grey to partition the various properties held in undivided interests by the O'Connor Trust, the Morgan Trust and Mrs. Grey individually. It had explained to her that it believed that the Morgan Trust was being disadvantaged by her unwavering decision to retain the real estate in her father's estate [1] and that such a partition would enable First National to perform more effectively its fiduciary duties to all parties concerned. When, in 1958, Mrs. Grey indicated her intention to revoke First National's agency agreement, First National again asserted its desire to partition. Mrs. Grey then temporarily withdrew her threatened revocation, but First National continued to press for partition.

In preparation for such a partition, First National requested the Dallas Real Estate Board to appraise all of the relevant properties. This appraisal was completed by October 1959, but Mrs. Grey was having difficulties deciding how she wanted the properties partitioned. First National made no suggestions or proposals, but continually repeated its desire to have the partition completed as soon as possible. In March 1960 Mrs. Grey made her "final decision" to partion the A'Mell property to the Morgan Trust, since its value, according to the 1959 appraisal, was now only $500,000 and she had neither the time nor the money with which to develop the property.

During the time that the parties were preparing for the partition, First National was considering the advisability

[1] The agency agreement entered into between Mrs. Grey and First National specifically limited First National's power so that it was without authority to sell or exchange Mrs. Grey's interest without first obtaining her consent.

of constructing a new bank building. A site study committee was appointed to make an investigation. At an executive committee meeting on March 3, 1960, the results of that investigation were reviewed, but the four plans presented were all rejected. Instead, the consensus was to acquire, if possible, all of City Block 60, in which was situated First National's motor bank and the A'Mell property. Three real estate firms were then engaged to acquire the eastern half of the block and their combined efforts bore fruit shortly thereafter.

Having been advised of the realtors' success, First National's president, Mr. Stewart, notified the bank's trust officer that the pending partition was to be postponed until agreement was reached with respect to the A'Mell property. A meeting was arranged with Mrs. Grey and her attorney, Mr. Leo Dorsey, to take place in New York on April 25, 1960. At that meeting Mr. Stewart informed Mrs. Grey of the bank's interest in the A'Mell property and told her that, because of a potential conflict of interests, First National would resign as trustee of the O'Connor and Morgan Trusts. Mrs. Grey insisted that resignation was not necessary and she adhered to this position even after she was informed that if the bank remained trustee a court proceeding would be required to free First National from the restrictions against self-dealing in the Texas Trust Act. Mrs. Grey stated that the only condition she would impose was that she get a better price than Majors would be getting for Republic Garage. It was also agreed at this time, pursuant to Mr. Dorsey's suggestion, that, prior to the sale, the A'Mell property would be partitioned to Morgan Trust since that Trust was entitled to favorable tax treatment.

On May 10, 1960, the Board of Directors of First National officially approved acquiring all of City Block 60. It was at this time that Majors deeded the Republic Garage to the bank in liquidation of his $650,000 indebtedness. First

National offered Mrs. Grey $750,000 for A'Mell [2] and she tentatively accepted. Dorsey then advised her against it and negotiations continued, culminating in a series of meetings in Dallas in early September 1960. Present were Mr. Stewart, First National's chairman of the Building Committee and its general counsel, Mrs. Grey, her son James, and Mr. Dorsey. Mr. Stewart offered to call someone in from the trust department, which suggestion was rejected, and he again offered to have First National resign as trustee of the two trusts, which was also rejected. Dorsey spent the morning of the first day criticizing the bank's past handling of trust affairs and the afternoon was spent discussing property values in City Block 60. The second morning, Dorsey was given, at his request, a schedule of prices paid for other properties in the block and there was some discussion of whether at the time of purchase and sale of Republic Garage Majors was First National's nominee or First National had any interest in that property. All such inquiries were answered by First National's representatives in the negative. That afternoon, Mrs. Grey called the bank, stating that an acceptable price at which to value A'Mell was $1,155,000. That figure was arrived at by multiplying the interior area by the per square foot figure to be paid Majors and computing the corner area in the same manner at an additional 25 per cent for corner property. The next day, Mr. Stewart obtained approval of the Board of Directors' Executive Committee to accept the $1,155,000 price, and that evening he and Mrs. Grey shook hands on the deal.

First National's general counsel drafted a Partition and Sale Agreement which provided for the partition of

---

[2] Since the A'Mell property was to be partitioned to Morgan Trust prior to the sale, neither Mrs. Grey individually nor the O'Connor Trust was technically a seller. Nevertheless, First National sought to obtain Mrs. Grey's approval of the purchase price because that price would in turn be the value assigned to A'Mell for purposes of the partition agreement.

several tracts of property[3] and for the purchase of one of those tracts (A'Mell) by First National for $1,155,000. The Agreement stated that both the partition and the sale were subject to a judgment being entered by a court of competent jurisdiction in a proceeding in which all of the persons bound by the Agreement, the Attorney General of Texas,[4] and the remaindermen, James and Michael Grey, were parties. In contemplation of such a suit, First National agreed to retain for the O'Connor Trust counsel recommended by Mrs. Grey, and Mrs. Grey agreed to file an answer praying that the Agreement be approved and to recommend to the remaindermen that they file a similar answer. Finally, all persons agreed to cooperate in consummating the Agreement in the most expeditious manner possible; indeed, the Agreement specifically stated that in the event the judgment was not final by December 31, 1960, all rights and duties under the Agreement would terminate.

The Partition and Sale Agreement was presented to Mrs. Grey and James for their signatures, but they left Dallas that evening for New York without signing. Aboard the plane, Dorsey explained the various provisions of the Agreement first to Mrs. Grey and then again to James. The following Monday, September 19, Mr. Stewart flew to New York where Mrs. Grey and James signed the Agreement. Mrs. Grey then flew to Paris, France, where on October 8,

---

[3] A'Mell, valued at $1,155,000, was partitioned in its entirety to Morgan Trust. The value of the remaining seven tracts was, according to the 1959 Dallas Real Estate Board appraisal, $1,675,000, and these seven properties were partitioned to Mrs. Grey individually and the O'Connor Trust in undivided interests of 19/39ths and 20/39th respectively. Since the value assigned A'Mell exceeded Morgan Trust's 21/60th interest in all eight properties by $164,500. Morgan Trust was to pay to Mrs. Grey individually $80,141.03 and to the O'Connor Trust $84,358.97.

[4] Under Texas law, the Attorney General was necessary as a representative of the public beneficiaries of the Morgan charitable Trust. Article 4412a, Revised Civil Statutes of Texas.

Michael signed his name. Neither James nor Michael was named as a contracting party to the Agreement, but each executed it, stating his approval, ratification and adoption with the same force and effect as if he were a party thereto.

Mrs. Grey neither selected nor retained counsel to represent her or her sons in the Texas court proceedings. She seemed intent on having the deal go through and did not want independent counsel to complicate a relatively simple agreement. First National then suggested that Mr. Philip Kelton represent the O'Connor Trust since his firm had previously done some work for it. Kelton in turn contacted Dorsey, asking if he were also authorized to represent Mrs. Grey and her sons, and Dorsey assured him that he was so authorized. On November 19, 1960, First National initiated suit in a state district court in Dallas County, Texas, with the bank in its individual capacity as plaintiff and the bank as trustee of the O'Connor Trust, the bank as trustee of the Morgan Trust, appellants here and the Attorney General of Texas as parties defendant. First National asked the court to find that the partition and sale provided for in the Partition and Sale Agreement were fair and equitable, to rule that it was relieved from restrictions under the Texas Trust Act with respect to self-dealing, and to approve and confirm the Partition and Sale Agreement. Kelton filed a joint answer on behalf of First National as trustee and appellants here, admitting the truth of the allegations in the petition and praying that the judgment sought be granted.[5] A hearing was scheduled for November 26.

The hearing lasted the greater part of the day and was characterized by the presiding judge as "a more than fair disclosure." Judgment was entered on November 28 and became final 30 days thereafter, just a few days before the December 31 deadline. Despite the fact that Mrs. Grey

[5] Morgan Trust represented by independent counsel (Mr. Armstrong) who had been selected by First National, filed a similar answer.

then refused to sign the Partition Deed (and has not signed the Deed to this day), the sale from the Morgan Trust to First National in its individual capacity was consummated. First National subsequently obtained the outstanding properties in City Block 60 and broke ground for its 52-story bank and office building.

In February 1961 Mr. Dorsey presented Mrs. Grey with a bill in the amount of $100,000 for attorney fees in connection with Mrs. Grey's transactions in Dallas. In the spring of that year, she was served in New York with a summons to appear in a lawsuit there against her individually for those fees, now valued at $140,000 plus $256.59 disbursements. Mrs. Grey then sought other New York counsel, present counsel of record, to defend her against Dorsey. An answer was subsequently filed in the New York courts denying liability, and a counterclaim was filed against Dorsey for damages resulting from unskillful and grossly negligent representation of Mrs. Grey. At the same time, counsel wrote First National that he believed the Partition and Sale Agreement was unenforceable and that "in disposing or otherwise dealing with the real property in question * * * you will be acting at your sole risk and peril." Nonetheless, First National proceeded with its plans and by the time this suit was brought in May 1963 its building, occupying the entire City Block 60, was completed.

II

We turn now to a consideration of appellants' specification of errors. They argue first that the District Court erred in denying their motions for a directed verdict or for judgment *n.o.v.* because the undisputed evidence conclusively showed, as a matter of law, that First National failed to make the requisite full disclosure to appellants of all facts within its knowledge material to its self-dealing.[6] We

[6] Appellants allege that the evidence established that First National (1) concealed its deed of trust covering Majors' $650,000 loan;

do not agree. Only where the evidence is such that there can be but one reasonable conclusion as to the verdict to be returned may the court grant a motion for a directed verdict. *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479-480 (1943). On the other hand where, as here, there are facts in the record as to which there is a genuine dispute and from which reasonable minds might draw different inferences,[7] it is incumbent upon the court, as it did in the instant case, to submit the question to the jury. See, *e.g.*, *Pan American Petroleum Corp.* v. *Orr*, 5 Cir., 319 F. 2d 612, 617 (1963). Moreover, appellants had the burden of proving a breach by First National of its fiduciary duties, and when the party moving for a directed verdict has such a burden, the evidence to support the granting of the motion must be so one-sided as to be of overwhelming effect. 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 1075 at 396 (Wright ed. 1961); 5 J. Moore, Federal Practice ¶ 50.02[1] (2d ed. 1967). Considering the evidence before us as we have recited it in our statement of the facts, we find that the District Court properly submitted the case to the jury.

---

(2) misrepresented its relationship with Majors; (3) concealed the proposed Sanger-Harris project which was to occupy the entire City Block 232 immediately north of City Block 60 (knowledge of this project was allegedly acquired by First National through its officers and directors who were also officers and directors of the Baptist Foundation of Texas, an organization that was instrumental in assembling City Block 232); and (4) concealed, if not falsified, its over-all costs of acquiring City Block 60 since, although Mrs. Grey was given a schedule of prices paid to the owners of the other fees in the block, no information with respect to the costs of terminating existing leaseholds or brokers' commissions was ever furnished her. (First National did furnish these figures to its own Board of Directors, thereby allegedly showing that reasonable businessmen would consider such information material.)

[7] Thus there is a dispute as to what First National said with reference to Majors; when information of the Sanger-Harris project can first be attributed to First National; and what information Dorsey had or received with respect to leaseholds and brokers' commissions.

The jury's resolution of the disputed facts is quite clear. The jury was asked:

> "SPECIAL ISSUE No. 2
>
> "Do you find from a preponderance of the evidence that the First National Bank in furnishing information to Mrs. Grey, James Grey, and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the State Court of November 28, 1960 made any material misrepresentations?
>
> "Answer 'yes' or 'no' as to each party."

The jury answered "no" as to every party. The jury was also asked:

> "SPECIAL ISSUE No. 3
>
> "Do you find from a preponderance of the evidence that the First National Bank in the negotiations with Mrs. Grey, James Grey, and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the State Court of November 28, 1960, concealed any material facts?
>
> "Answer 'yes' or 'no' as to each party."

Again the jury answered "no" as to every party. These questions were all-inclusive: all of appellants' allegations were fully developed at trial and all were resolved against them. The court in charging the jury made it clear that the fraud issue related not only to the execution of the Partition and Sale Agreement, but to the entry of the state court judgment as well. The questions as phrased had the same effect.[8] The jury might have found that

---

[8] Since the jury found that the state court judgment was not procured by fraud, this court need not reach an issue which would otherwise assume paramount importance. Thus, in supplemental briefs, the parties have devoted considerable time and effort to explaining the difference between "extrinsic" and "intrinsic" fraud

there was no misrepresentation or no concealment or that those found were not material.[9] The scope of our review

insofar as it relates to setting aside a prior judgment. Such discussion was probably considered necessary since the parties admitted that under Texas law (which we must apply since in these proceedings we are exercising diversity jurisdiction, *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938)) a prior judgment can be set aside for lack of jurisdiction or for fraud, *O'Boyle* v. *Bevil,* 5 Cir., 259 F. 2d 506, 512 (1958), *cert. denied,* 359 U.S. 913 (1959), but the fraud which is a valid ground for such purposes must be "extrinsic" to the prior judgment. *Alexander* v. *Hagedorn,* Tex. Sup. Ct., 226 S.W. 2d 996, 1001 (1950). The jury's determination that there was no fraud makes the inquiry as to whether the allegations constituted extrinsic or intrinsic fraud of academic interest only.

This case is another vivid illustration of the great utility of the Rule 49(a), *Fed. R. Civ. P.*, general charge and special verdict which this court so often heralds. See, *e.g., Weymouth* v. *Colorado Interstate Gas Company,* 5 Cir., 367 F. 2d 84, 93, n. 31 (1966); *American Oil Company* v. *Hart,* 5 Cir., 356 F. 2d 657, 659 and n. 5 (1966). The general charge illumines the verdict questions-answers and vice versa. Every critical fact has been exercised against nearly every likely contingency to enable us to analyze the legal contentions against specific, identifiable findings, not just a series of assumed implied findings from an unrevealing general verdict and its enigmatic mysteries. See, *e.g.,* Notes 10, 12 and 13 *infra* and related text. By this method our inquiries were simplified to determine as to each challenge (a) the formal correctness of the verdict answer and supporting charge, (b) the substantive correctness of the charge and verdict question, and (c) the sufficiency of the evidence to support the answer.

[9] Thus, for example, with respect to Majors, his connection with First National and the deed of trust would be material, and First National's failure to disclose or its concealment would be a breach of its fiduciary duties, only if First National would not have paid Majors the same price had he not been so indebted. There was evidence, however, that there was never any talk of foreclosure or of First National's power to foreclose, that the Republic Garage property simply was not worth more than $650,000, and that B. H. Majors, Z. L. Majors' brother, partner and an accommodating party on the note held by the bank, was worth, at a conservative estimate, over a million dollars.

is such that we neither sift facts nor draw inferences from such facts. This function is performed by the jury and so long as the evidence has that minimal quality required to send the case to the jury, the jury's resolution of the factual issues will prevail. *Williams* v. *National Surety Corp.*, 5 Cir., 257 F.2d 771, 772-773 (1958).

Assuming that the evidence was sufficient to take the case to the jury, appellants maintain that the verdict still may not stand because the charge to the jury was both incomplete and misleading. They argue first that the District Court, in effect, refused to advise the jury of their contention that simple failure on the part of First National, as trustee, to disclose material facts was an issue. Appellants refer specifically to the court's comment:

> "The issues in this case for your decision are: (1) Whether the First National Bank in its individual capacity misrepresented or concealed material facts which were relied on to the damage of Plaintiffs * * *."

By using "misrepresented" and "concealed," appellants assert, the court placed an undue burden upon them, since such words not only connote affirmative acts, unlike negative silence in failure to disclose, but in addition may even connote bad faith. We find no merit in this argument. We have repeatedly held that a charge "must be viewed as a whole, in connection with the contentions aired by the parties in the Court below, and it must be viewed from the standpoint of the jury." *See, e.g., Garrett* v. *Campbell*, 5 Cir., 360 F.2d 382, 386 (1966). Considered as a whole, we find that the court did charge the jury that an issue was First National's failure to disclose. For example, the court stated that "[i]t is the contention of Plaintiffs that the Bank as Agent and Trustee violated its fiduciary duties * * *" and that "[t]he First National Bank denies that it misrepresented or concealed any material facts, contending on the other hand, that *it made a full disclosure*

of all material facts." (Emphasis added.) The court also charged the jury that "there must be fair dealing and good faith by the Trustee toward the beneficiary" and the "Trustee * * * has a duty to impart to the beneficiary all material facts in dealings between the Trustee and the beneficiary." [10]

Moreover, in examining the record we find that appellants themselves were not always conscious of a difference between misrepresentation and concealment, on the one hand, and failure to disclose, on the other. Thus in Paragraph 19 of their complaint they stated, "Bank was under *a duty to disclose* to plaintiffs each and all of the facts alleged in paragraph 18 hereof, and *by concealing the same* * * *" (emphasis added). The same phraseology is utilized in Paragraphs 22 and 56, and if appellants may use the terms interchangeably, they should not be heard to complain if the court does also.

Appellants also object to the court's definition of "material," alleging that it completely disregarded the nature

---

[10] The complete charge to the jury on this point is as follows:

"* * * [T]he relationship of principal and agent is fiduciary in nature and therefore the agent is required to be loyal and to act in good faith. The Agent * * * *has the duty of imparting to his principal,* every material fact relating to a transaction, if in the scope of the agency, on becoming aware of such facts during the course of the transaction.

"The First National Bank, in addition to being the agent of Mrs. Grey, was the Trustee of the O'Connor Trust, of which Mrs. Grey was the beneficiary, and James C. and Michael C. Grey were the Remaindermen-beneficiaries.

* * *

"You are instructed that the Trustee of a Trust occupies the position of a fiduciary of the Trust, that is, there must be fair dealing and good faith by the Trustee toward the beneficiary. The Trustee has the duty to act in the best interests of the beneficiary of the Trust, and *has a duty to impart to the beneficiary* all material facts in dealings between the Trustee and the beneficiary." (Emphasis added.)

of the confidential relationship between appellants and First National. The court's charge defining "material" [11] was a complete and accurate dictionary definition of the term. Moreover, in order to appraise its sufficiency, it must be read in conjunction with other parts of the charge bearing on the relationship of the parties. When so read, we find the charge on "material" adequate.

Finally, appellants claim that the court's instruction that Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them was tantamount to instructing a verdict for First National on the issues of fraud and damage. Again we find no merit in this objection. The court's charge, taken as a whole, shows that the issue of the state court's jurisdiction was completely separate from the issue of whether First National fraudulently obtained that judgment. The distinction is also clear from the special interrogatories: Special Issue No. 1 went to Kelton's authority; Special Issues Nos. 2 and 3 to the alleged concealment or misrepresentation. We therefore see no basis for appellants' contention that the jury might have believed that if it answered "yes" as to Kelton's' authority, it was bound to answer "no" as to fraud.

Since we find that the evidence was sufficient to take the case to the jury, that there were no errors requiring reversal in the court's charge, and that the jury's verdict is amply supported by the record, we hold that appellants' motions for a directed verdict,[12] for judgment *n.o.v.*, and for a new trial were properly denied.

---

[11] "As to the term 'material', as used in this charge, I instruct that for a fact to be 'material' to a transaction, it should be of solid or weighty character; substantial; of consequence; not to be dispensed with; important."

[12] Appellees correctly note that, even if the court had directed a verdict for appellants, it would then have had to submit to the jury the question of the amount of damages sustained by appellants. In fact, such a question was given to the jury:

"SPECIAL ISSUE No. 5

"Do you find from a preponderance of the evidence that Mrs. Grey, James C. Grey, or Michael C. Grey were damaged by such misrepresentations, if any, or concealments, if any?

"Answer 'yes' or 'no' as to each party."

The jury answered "no" as to every party. Perhaps of even greater significance is the jury's negative answer to the following:

"SPECIAL ISSUE No. 11

"Do you find from a preponderance of the evidence that the A'Mell Building had a fair market value in excess of $1,155,000.00 on September 19, 1960?

"Answer 'yes' or 'no'."

Therefore, even if the court had erred in not directing a verdict for appellants, appellants would not have been prejudiced thereby.

Appellants also sought exemplary damages, but, according to Texas law, such recovery presumes a showing of malice, *Baker* v. *Moody*, 5 Cir., 219 F. 2d 368, 371 (1955); *Mossop* v. *Zapp*, Tex. Civ. App., 189 S.W. 979, 981 (1916), which the jury was unable to find, as is illustrated by its negative answer to the following:

"SPECIAL ISSUE No. 7

"Do you find from a preponderance of the evidence that the First National Bank acted with malice in its actions relating to the partition and sale agreement of September 19, 1960 or in obtaining the Judgment of the State Court of November 28, 1960?

"Answer 'yes' or 'no'."

III

Appellants also contend in their specification of errors that the District Court should have directed a verdict in favor of James and Michael Grey since the evidence showed that they were denied due process of law with respect to the 1960 state court judgment. Appellants' complaint stated that James and Michael "were never personally or constructively served with process in the aforesaid action, nor

did they appear therein either personally or by a duly appointed attorney," and that consequently the state court judgment is void as to them. Appellants acknowledge that the judgment itself stated that "[a] 11 persons having any interest in the subject matter of this suit are properly before the Court," but they correctly note that the fact that the judgment recites jurisdiction does not necessarily prevent the court from inquiring into facts disclosed by the complete record. *O'Boyle* v. *Bevil,* 5 Cir., 259 F.2d 506, 518 (1958), *cert. denied,* 359 U.S. 913 (1959); *Lutcher* v. *Allen,* 43 Tex.Civ.A. 102, 95 S.W. 572 (1906).[13]

Appellants admit that Dorsey told Kelton that Kelton was authorized to represent James and Michael, and that Kelton, in good faith reliance upon that representation, filed an answer on their behalf in the state court proceeding.[14] There is also no dispute that Dorsey was authorized

---

[13] Normally the relevant record would be that of the prior court's proceeding, but since counsel for First National made no objection to the introduction in the District Court of any of appellants' evidence which might be probative of the state court's lack of jurisdiction over James and Michael, we have given such evidence the same force it would be entitled to if it were part of the original record. See, *e.g., Texas Pacific Coal & Oil Co.* v. *Ames,* Tex. Civ. App., 284 S.W. 315, 317 (1926), *reversed on other grounds,* Tex. Comm. App., 292 S.W. 191 (1927).

[14] It is undisputed that Kelton filed a *joint* answer on behalf of the O'Connor Trust and Mrs. Grey, James and Michael. Appellants claim that the joint answer, which admitted the truth of the allegations of First National's petition and asked the court "to approve the proposed transaction by entering the Judgment prayed for in Plaintiff's Petition," constituted a confession of judgment. Appellants further argue that Rule 314 of the Texas Rules of Civil Procedure provides that when judgment is confessed by an attorney, the judgment is not valid unless the judgment itself recites the power of attorney to confess such a judgment. We find this objection to be without force, since the state court proceeding cannot realistically be characterized as a confessed judgment: the hearing lasted almost a full day; six witnesses testified; 13 exhibits were introduced; the transcript covers 85 pages; the judge complimented the attorneys for "a thoroughly developed case"; and, quite significantly, the state Attorney General's approval of the proposed transaction was not given until after the *end* of the proceedings.

to speak for Mrs. Grey, but appellants assert that he was her attorney *only* and not an attorney for her sons as well.[15] Appellants claim, therefore, that Dorsey was without authority from James and Michael to engage Texas counsel to represent them. Dorsey did represent the boys in at least one other matter, but in that instance, unlike the present, Michael had supplied a specific, written authorization. Again with reference to Michael, Dorsey testified that he had not communicated with him after April 1960. Kelton had never communicated with either James or Michael, nor had representatives of First National personally contacted or attempted to contact Michael or James, with respect to the state court proceeding.[16]

---

[15] Appellants note that when Dorsey sought compensation for his efforts in connection with the Dallas transaction he submitted his bill to Mrs. Grey alone. The suit which was subsequently initiated to collect his fee was also brought against her alone. In addition, Dorsey's office ledger sheet carrying the account contained only her name and not also the names of James and Michael.

[16] Appellants stress the lack of communication between First National and James and Michael, alleging that James and Michael were denied state due process insofar as they were not given the notice required by § 24E of the Texas Trust Act, Article 7425B, Texas Revised Civil Statutes:

> "A court of competent jurisdiction may * * * for cause shown and *upon notice to the beneficiaries,* relieve a trustee from any or all of the duties, limitations and restrictions which would otherwise be placed upon him by this act." (Emphasis added.)

We need not reach appellees' claim that James and Michael are not beneficiaries within the meaning of this section and therefore not necessary parties to the suit. Instead, since we affirm the finding of the District Court that Kelton was authorized to represent James and Michael, we merely note that under Rule 121 of the Texas Rules of Civil Procedure, an answer constitutes an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him. Moreover, since the notice requirement of the Texas Trust Act is to give notice, we can find no harm to James or Michael, who had each signed the Partition and Sale Agreement

Appellants assert that, given this evidence, it was error for the District Court to deny their motion for a directed verdict as to James and/or Michael Grey. We do not agree. As noted above, the party moving for a directed verdict has a heavy load, particularly when he also carries the burden of proof on the issue in question. 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 1075 at 396 (Wright ed. 1961); 5 J. Moore, Federal Practice ¶ 50.02[1] (2d ed. 1967).[17] Here, as with the issue of fraud, we find that the evidence is not such that it showed without dispute that James and Michael did not authorize the employment of Kelton to represent them. Accordingly, we find that the District Court properly denied appellants' motion and submitted the issue to the jury.

---

which, according to its terms, was conditioned upon the entering of a judgment in such a proceeding to be commenced as soon as possible.

[17] An attorney who enters an appearance for a party is presumed to be authorized to do so. *Hidalgo County Drainage Dist.* v. *Magnolia Petroleum Co.*, Tex. Civ. App., 47 S.W. 2d 875, 876 (1932); *Dyer* v. *Johnson*, Tex. Civ. App., 19 S.W. 2d 421 (1929). Appellants attempt to counteract this argument by pointing out that no presumptions, particularly as to jurisdiction, prevail with respect to judgments, such as the 1960 state court judgment, rendered pursuant to special statutory requirements. *Mingus* v. *Wadley*, Tex. Sup. Ct., 285 S.W. 1084, 1089 (1926); *Cunningham* v. *Robison*, 104 Tex. 227, 136 S.W. 441 (1911). First National argues that the purpose of the provisions of § 24E of the Texas Trust Act by which it submitted the Partition and Sale Agreement to judicial scrutiny is to enable a trustee to put to rest once and for all any questions of unfairness or improper self-dealing on its part. We do not agree, since we find no evidence of legislative intent that this action have any more conclusive effect of finality than would any other Texas judgment. But neither do we believe that a recitation of the law that no presumptions with respect to jurisdiction attach to statutory actions counteracts or even is relevant to the proposition that an attorney who appears in court for a party is presumed to be authorized to represent that party.

The issue was phrased as follows:

"SPECIAL ISSUE No. 1

"Do you find by a preponderance of the evidence that Philip Kelton did not have authority to represent James C. Grey or Michael C. Grey in the case of First National Bank against Cornelia O'Connor Grey et al., in the 116th Judicial District Court, Dallas County, Texas?

"Answer as to each party, 'He was not authorized' or 'He was authorized'."

The jury answered as to both James and Michael "He was authorized," and we find that there is sufficient evidence in the record to support this conclusion.[18] James was personally present and actively participated in the September negotiations in Dallas; at that time Dorsey purported to speak for "Mrs. Grey and her sons" and James did not deny his authority to do so. Michael testified that he left the management of his interest to his mother and never disagreed with her about such matters. Mrs. Grey told Dorsey (in front of James) to direct all correspondence about the Partition and Sale Agreement to her and "she would take it up with the boys." Indeed, the letter Dorsey wrote Mrs. Grey in November 1960 saying that he had authorized Kelton to represent her and her sons reached her in Paris where she was staying with both of her sons. Thus the jury could reasonably have found that the Dallas transaction was a family affair, that the mother spoke for the family, and that Dorsey was the family attorney protecting the family interests.

Nonetheless, appellants would have this court disregard the jury's finding. They claim that it is undisputed that Dorsey authorized Kelton and that therefore the question

---

[18] In effect, therefore, we find no merit in appellants' alternative specification of error, that is, that the District Court abused its discretion in denying appellants' motion for a new trial on the ground that the jury's answer to Special Issue No. 1 was contrary to the overwhelming weight of the evidence.

should have been phrased to ask whether James and Michael authorized Dorsey. As the issue was phrased, they claim, the jury might have thought that so long as Kelton was authorized by anyone, they must answer yes. We see no basis for this contention, since the jury's answer was explicit: "James C. Grey: He was authorized. Michael C. Grey: He was authorized." Moreover, Rule 49 of the Federal Rules of Civil Procedure "clearly leaves the matter of the form of a special verdict and interrogatories to the sound discretion of the trial court." *DeEugenio* v. *Allis-Chalmers Mfg. Co.*, 3 Cir., 210 F. 2d 409, 415 (1954).

Appellants also take exception to the instructions accompanying Special Issue No. 1, whereby the jury was told that authority can be conferred directly or by an agent, that it can be written or oral, and that it can be "express," "implied" or "apparent." Appellants object that there is no evidence to support the instruction as to apparent authority. Considering the evidence as we have already summarized it, we disagree and find that the District Court did not abuse its discretion either in phrasing the question to be answered or in instructing the jury on the applicable standards.

IV

Appellants also allege errors relating specifically to the conduct of the trial in the District Court, or, in the alternative, an abuse of the trial court's discretion in the handling of that trial. We find these allegations to be without merit.

Appellants first object to the trial court's refusal to admit certain documentary evidence which was probative of First National's knowledge, prior to the November 28, 1960 judgment,[19] of contemplated substantial improvements

[19] Appellants assert and appellees agree that First National's duty of disclosure did not cease with the signing of the Partition and Sale Agreement, but rather continued through the time judgment was entered by the state court on November 28, 1960.

in the block immediately north of City Block 60.[20] These documents consisted primarily of pre-September 14, 1960 letters and memoranda produced by the Baptist Foundation of Texas (BFT) at depositions of its executive secretary. First National had objected to the introduction of such documents because there was no evidence that the persons writing or receiving them [21] were at that time acting on behalf of BFT. There is evidence that an agency relationship existed after September 14,[22] and appellants would have this court find that that is a sufficient basis from which to imply a similar relationship prior to that time, so as to provide a proper predicate for the introduction of the documents. We do not agree. The fact of agency must be proved and cannot be presumed. 3 Am. Jur. 2d Agency § 349 at 706 (1962). Since it is clear that the party who seeks to introduce written evidence must in some way authenticate it, 7 J. Wigmore, Evidence § 2130 (3d ed. 1940), and since appellants made no attempt to show that the writers of the documents who could have authenticated them were unavailable as witnesses and could not have been summoned to testify, we find no error or abuse of discretion by the trial court in refusing to admit the documents in question.

Appellants' second objection is directed at the trial court's refusal to answer directly a question sent out by the jury during the course of its deliberations. The question was as follows:

---

[20] This refers, of course, to the Sanger-Harris project discussed *supra* in Note 6.

[21] The two principal persons involved were a Mr. Carr Collins, a director of First National and a member of its executive committee, and a Mr. Richards, an executive in an insurance company owned and controlled by Mr. Collins.

[22] First National did not object to the introduction of documents attributable to Collins and Richards after September 14, 1960, and such documents were admitted and considered by the jury.

> "Was their [sic] any testimony to indicate whether the bank told Mrs. Grey or her attorney that Mr. Majors owed the First National bank $650,000.00 on The Republic Garage building."

Appellants requested the court to instruct the jury that there was no testimony in the record indicating First National told Mrs. Grey or her attorney about the Majors note or deed of trust. Instead, the court responded: "The Jury is the exclusive judge of the evidence." We believe the court's reply was an appropriate one. In order to answer the question on the merits, the judge would have had to review over 2,000 pages of transcript and 400 exhibits and, in the absence of direct testimony, draw an inference as to the proper answer. This would have been an insurmountable burden. As an alternative, the judge could simply have tried to recall the evidence and evaluate its significance, but in so doing she would have been acting as a 13th juror. Appellants argue that at least the trial judge should have instructed the jury that it had a right to request any portion of the testimony to be read to it in open court by a court reporter. We need not now consider this objection since appellants did not request such an instruction below. 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 1021 at 310-312 (Wright ed. 1961); 5 J. Moore, Federal Practice ¶ 46.02 (2d ed. 1967).

Appellants' third objection goes to the trial court's limiting of their time for an opening statement and closing arguments to the jury. Appellants assert that the complexity of the case, the length of the trial (three weeks), and the variety of their allegations necessitated their being given more than 30 minutes for their opening statement and one hour and 20 minutes for their closing argument. This limitation, they allege, greatly inhibited their ability properly to present and summarize to the jury their claims

and the evidence to support them. However, this is a question so clearly committed to the discretion of the trial judge that we would intervene only where there is an egregious abuse of that discretion. See, *e.g., Rosiello* v. *Sellman*, 5 Cir., 354 F. 2d 219, 220 (1965). This case simply does not satisfy that criterion and accordingly we reject appellants' allegation.

Lastly, appellants note that the District Court in granting a directed verdict for the Morgan Trust and the state Attorney General at the close of the plaintiffs' case stated:

> "I am not sure that I am making myself clear, but I think that there are two reasons why there are no grounds for setting aside the partition—one is that I do not think that it would be equitable to do it, and the second is that it has been approved by the State Court, and that the O'Connor Trust and Mrs. Grey were represented, and the lawyers who represented them were authorized to act * * *."

Appellants correctly note that the trial judge filed no findings of fact and conclusions of law as required by Rule 52, Fed. R. Civ. P., to support this conclusion. But curiously appellants do not request that this case be remanded for such findings and conclusions on the so-called equitable issues in this case. Instead, they ask that this court find that as a matter of law they are entitled to judgment. On the record evidence we are unable to make this finding.

V

Finally appellants object here to the District Court's allocation of counsel fees,[23] alleging, in brief, that the

[23] A hearing was held on May 20, 1965, on a motion for the payment by the O'Connor Trust and the Morgan Trust of the fees and expenses of the attorneys respectively retained by First National to represent such trusts.

O'Connor Trust was surcharged with fees for an attorney [24] who defended First National contrary to the best interests of the trust beneficiaries, appellants here. Appellants specifically charge that counsel for First National in its individual capacity, counsel for First National as trustee for the Morgan Trust, and counsel for the O'Connor Trust worked in conjunction with each other and filed similar, if not identical, answers, and that ironically counsel for the O'Connor Trust can only justify his presence by noting that he cross-examined the beneficiaries of the trust, James and Michael at trial and Mrs. Grey at deposition.

We begin with the general proposition that a trustee may charge his trust for attorney's fees which the trustee, acting reasonably and in good faith, incurs in defense of litigation charging him with a breach of trust. 2 A. Scott, Trusts § 188.4 (1956). We have stated that the jury found no breach of the bank's fiduciary duties and thus we may assume that First National as trustee of the O'Connor Trust was acting reasonably and in good faith. Appellants, however, object that First National "did not come into a court of equity and say with candor: 'I have defended myself successfully against claims of my beneficiaries and am entitled to an allowance for my attorneys, Messrs. Coke & Coke, my general counsel,' and that instead Bank's

---

[24] Mr. Strasburger, a member of Philip Kelton's firm, was selected by First National to represent the O'Connor Trust. He testified:

> "* * * [S]omebody that was disinterested had to be in here to see that that Trust was treated right and to see whether or not the Bank had taken advantage of them, and that was the attitude in which I took employment and I made it known when I first took employment that I wasn't going to be a rubber stamp in here for the First National Bank and that I was going to reserve my decision until everything had been developed, and if I thought the Trusts hadn't been treated right, I'd be joining the Plaintiffs, and if I thought that the Trusts had a fair settlement, I would be in here fighting for it and trying to save it * * *."

stratagem was to seek an allowance for the fees of a *second* set of attorneys on the pretense that the services rendered were in defense of 'the trust' * * *." (Emphasis in appellants' brief.) We need only note that the suit was originally brought by the appellants and that they specifically named the trusts as well as First National in its individual capacity as parties defendant. Appellants should not now be heard to object that the parties they joined have defended themselves.

There is, however, one complication. It appears that the O'Connor Trust, like the Morgan Trust, was originally joined only because it would be a necessary party were the court to grant the equitable relief requested. Indeed, the court asked counsel for the O'Connor Trust:

> "THE COURT:
>
> Let me ask you this: If the Plaintiffs had brought simply a damage suit for fraud, do you think that it would have been necessary for the Trusts to have been brought in?
>
> "Mr. Strasburger:
>
> I certainly don't. I think that's what they should have done in the first place—very strongly."

Consequently, appellants assert that, when the Morgan Trust sought and was granted a directed verdict at the close of the plaintiffs' case, counsel for the O'Connor Trust should have done likewise. This would have minimized the amount of chargeable time and in turn the amount of fees recoverable from the trust.[25]

---

[25] Appellants note that the Morgan Trust was charged $45,000 whereas the O'Connor Trust was charged $50,000, because the latter "took a greater responsibility in the trial of the case; and was here for a longer time in court."

Although appellants here raise a valid point, we find no prejudice. It is clear that First National could have charged the O'Connor Trust for all fees and expenses of attorneys representing it in its individual capacity since it was exonerated of a charge of breach of trust initiated by the trust beneficiaries, and it is equally clear that the bank voluntarily paid or will pay all such fees and expenses. Moreover, the allocation of counsel fees is a question of discretion vested in the District Court and we find no abuse of that discretion which would warrant either reversal or remand. *American National Bank of Beaumont* v. *Biggs*, Tex. Civ. App., 274 S.W. 2d 209 (1954).

Accordingly, the judgment of the District Court is

AFFIRMED.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 22988

D. C. Docket No. CA 3-63-144

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Appellants,

versus

FIRST NATIONAL BANK IN DALLAS, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before:

BROWN, *Chief Judge*, and GEWIN and WRIGHT,*
Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

* Of the District of Columbia Circuit, sitting by designation.

It is further ordered and adjudged that the appellants, Cornelia O'Connor Grey, James Charles Grey and Michael Carter Grey, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 21, 1968

Issued as Mandate: June 25, 1968

Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22988

—o—

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Appellants,

VS.

FIRST NATIONAL BANK IN DALLAS, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

—o—

(June 14, 1968)

Before:

BROWN, *Chief Judge,* and GEWIN and WRIGHT,* *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby, DENIED.

---

* Of the District of Columbia Circuit, sitting by designation.

APPENDIX B

TEXAS REVISED CIVIL STATUTES

Art. 7425b—12. Trustee buying from or selling to self

A trustee shall not buy nor sell, either directly or indirectly, any property owned by or belonging to the trust estate, from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee, or of an affiliate; or from or to himself, a relative, employer, partner or other business associate; provided a national banking association, or a state chartered bank and trust company, or a state chartered trust company, or a state chartered bank having trust powers, or any other state chartered corporation having the right to exercise trust powers, when acting or serving as executor, administrator, guardian, trustee, or receiver, may sell shares of the capital stock of itself so owned or held by itself, for any estate, to one or more of its officers, stockholders or directors, upon a court of competent jurisdiction finding that any such sale will be to the best interest of the estate owning such shares; fixing or approving the price to be paid therefor, and the terms of sale, and upon entering an order, decree or judgment, authorizing, approving and directing such sale to be made; and provided further that a corporate trustee, executor, administrator, or guardian, when authorized by will, trust agreement, other trust instrument, or judicial order, to retain its own capital stock in trust, may exercise rights to purchase its own stock when increases in its capital stock are offered pro rata to stockholders; provided, moreover, that such exercise of rights, in the circumstances then prevailing, shall be consistent with the judgment and care which men or ordinary prudence exercise in the management of their own affairs. Acts 1943, 48th Leg. p. 232, ch. 148 § 12; Acts 1945, 49th Leg. p. 109, ch. 77 § 4.

Art. 7425b—23. Power of beneficiary

Any beneficiary of a trust affected by this Act may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee, relieve the trustee as to such beneficiary from any or all of the duties, restrictions, responsibilities and liabilities which would otherwise be imposed on the trustee by this Act, including the release of the trustee from any or all liability to such beneficiary for past violations of any of the provisions of the Act, except as to the duties, restrictions, and liabilities imposed on corporate trustees by Sections 10, 11, and 12 herein. Acts 1943, 48th Leg. p. 232, ch. 148 § 23.

Art. 7425b—24. Power of the court

A. The district court shall have original jurisdiction to construe the provisions of any trust instrument; to determine the law applicable thereto; the powers, responsibilities, duties, and liability of trustee; the existence or non-existence of facts affecting the administration of the trust estate; to require accounting by trustee; and to surcharge trustee.

B. In cases where there be a single trustee, the venue of such actions shall be in the county of the residence of such trustee; or if a corporation, in the county of its principal place of business. Where there are two or more trustees, then the venue shall be in the county where the principal office of the trust is maintained.

C. Actions hereunder may be brought by a trustee, beneficiary, or any person affected by or having an active interest in the administration of the trust estate. If the action is predicated upon any act or obligation of any beneficiary, such beneficiary shall be a necessary party to the proceedings. The only necessary parties to such actions

shall be those persons designated by name in the instrument creating the trust, and any persons who may be actually receiving distributions from the trust estate at the time the action is filed; contingent beneficiaries designated as a class shall not be necessary parties.

D. Except as otherwise provided herein, the provisions of the statutes and rules of court governing civil procedure, commencement of action, process, process by publication, appointment of guardians ad litem, supersedeas and appeal, shall govern all actions and proceedings instituted under the provisions of this Act.

E. A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties, limitations, and restrictions which would otherwise be placed upon him by this Act, or wholly or partly release and excuse a trustee, who has acted honestly and reasonably, from liability for violations of the provisions of this Act. Acts 1943, 48th Leg. p. 232, ch. 148 § 24.